371 N.C.—No. 4 Pages 486-578

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY 1, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 26 OCTOBER 2018

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SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 8, 9, 10
February 4, 5, 6, 7
March 4, 5, 6, 7
April 8, 9, 10, 11
May 13, 14, 15, 16
August 26, 27, 28, 29
September 30
October 1, 2, 3,
November 4, 5, 6, 7
December 9, 10, 11

IN RE CHAPMAN

[371 N.C. 486 (2018)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 17-262
RONALD L. CHAPMAN, RESPONDENT

No. 197A18

Filed 26 October 2018

Judges—discipline—unreasonably delayed ruling

A district court judge was suspended without pay for thirty days where he delayed issuing a ruling in a domestic matter for years, never made a ruling, and the file on the case went missing.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 14 June 2018 that Respondent Ronald L. Chapman, a Judge of the General Court of Justice, District Court Division Twenty-six, be suspended for thirty days without pay for conduct in violation of Canons 1, 2A, 3A(5), and 3B(1) of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 30 August 2018, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before this Court is whether District Court Judge Ronald L. Chapman should be suspended without compensation for violations of Canons 1, 2A, 3A(5), and 3B(1) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be suspended without compensation by this Court.

On 8 January 2018, the Commission Counsel filed a Statement of Charges against Respondent alleging he had engaged in conduct inappropriate to his office by failing to issue a ruling for more than five years on a motion for permanent child support. Respondent fully cooperated

with the Commission's inquiry into this matter. In the Statement of Charges, Commission Counsel asserted that Respondent's actions constituted conduct inappropriate to his judicial office and prejudicial to the administration of justice constituting grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed his answer on 21 February 2018. On 5 April, Commission Counsel and Respondent entered into a Stipulation and Agreement for Stated Disposition (the Stipulation) containing joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to suspend Respondent without compensation. The Stipulation was filed with the Commission on 9 April. The Commission heard this matter on 11 May and entered its recommendation on 14 June 2018, which contains the following stipulated findings of fact:

> 1. On or about November 30, 2012, Respondent concluded presiding over a multi-day hearing in *Ives v. Ives*, Mecklenburg County File No. 10CVD15357, to determine plaintiff Laura Ives' claims for permanent child support and attorney's fees. Ms. Ives was represented by attorney Jonathan Feit and the defendant Mr. Ives was represented by attorney Dorian Gunter. At that time, the parties were subject to an October 25, 2010 order for temporary child support wherein Mr. Ives paid Mrs. Ives support in the amount of $1,725.00 per month for the four (4) Ives children. Based on Mr. Ives' income, Mrs. Ives argued at the November 30, 2012 hearing that she was entitled to $5,087.50 per month in child support and $17,490.50 in attorney's fees. Respondent reserved his ruling and took the matter under advisement.
>
> 2. On December 5, 2012, Respondent indicated to Mr. Feit that he would make his ruling a priority over the upcoming holidays. Respondent did not issue a ruling over the December 2012 holidays.
>
> 3. On January 22, 2013, Mr. Feit emailed Respondent inquiring as to the status of his ruling. The following day, Respondent replied that he was "shooting for [tomorrow] afternoon. Friday [January 25, 2013] noon at the latest." No ruling was made by Respondent that week. On January 28, 2013, Respondent emailed the attorneys that

he had been in court the previous Friday, but would "continue to work on [this] order."

4. On February 27, 2013, Mr. Feit emailed Respondent, again seeking an update on the status of the ruling/order. Respondent did not respond to Mr. Feit's email.

5. On June 14, 2013, Mr. Feit emailed Respondent again to inquire as to the status of the ruling/order. Later that day, the attorneys received a response from Respondent's judicial assistant, stating that Respondent was working to resolve all of his pending domestic cases, including the *Ives* matter.

6. On October 16, 2013, Mr. Feit emailed Respondent and his judicial assistant requesting an update and expressing the need to have the matter addressed quickly because his client was receiving insufficient child support. On October 25, 2013, Respondent replied that he would be working on the *Ives* case that coming weekend, but acknowledged there were issues they needed to discuss "due to the delay getting this to you." Several days later, Respondent followed up with another email wherein he again committed to quickly complete the ruling.

7. After another two (2) months, Mr. Feit emailed Respondent again on January 3, 2014 and stressed that the order was required to resolve ongoing financial issues. Respondent, over a month later, informed Mr. Feit on or about February 12, 2014 that he would be "taking it home with him" because the courts were closing due to inclement weather.

8. On March 10, 2014, Mr. Feit emailed Respondent again asking for a ruling. Respondent did not reply.

9. After several more months went by without a ruling from Respondent, Mr. Feit emailed Respondent on June 9, 2014 imploring him to "please let us hear from you." Respondent again did not reply.

10. On July 7, 2014, Mr. Feit emailed Respondent once again to inquire into the status of Respondent's ruling. Respondent replied two (2) days later that, barring late assignments, he was not assigned in court the following week and he would "commit to scheduling time to wrap [this] up."

11. On July 21, 2014, after the unassigned court week, Respondent informed the attorneys that he "had more court than expected" but would "give [them] a decision or update by later [this] week." No decision or update came from Respondent that week. Several weeks later, on August 19, 2014, Mr. Feit asked for an update and, again, Respondent did not reply.

12. With more than two years since the hearing on permanent child support, and in an effort to secure some action from Respondent, on December 5, 2014, Mr. Feit provided Respondent with a proposed order even though Respondent had not requested one. Upon objection from opposing counsel as to the content of the proposed order, Mr. Feit offered to make any changes Respondent suggested. Respondent took no action on the proposed order.

13. Two (2) months later, on February 12, 2015, Mr. Feit followed up with Respondent with another email asking him to "please either sign the order as presented or let us hear from you one way or the other so we can move this matter forward." Respondent replied the following day that "you will hear from me no later than 10 days from now." Eleven (11) days later, on February 24, 2015, Respondent emailed the attorneys that because of other court assignments, he had not worked on the *Ives* matter. However, Respondent told the attorneys "[he would] work on *Ives* over the[ ] next two weekends" and during his vacation week in March. No ruling followed Respondent's vacation.

14. In an email to Respondent on April 17, 2015, Mr. Feit continued to stress the need to "move this matter along." Later that day, Respondent acknowledged in an email that he had not "held up my end of things" and "sincerely hope to get up with you soon."

15. On May 19, 2015, Mr. Feit again asked for Respondent to "please let us have your order." Respondent did not reply.

16. On July 14, 2015, Mr. Feit emailed Respondent asking to be informed whether Respondent planned to sign the proposed order. On July 23, 2015, Respondent replied that he had been out of the office, but would

"communicate a substantive response about when I will have something for you by Monday." On July 27, 2015, Respondent followed up with the attorneys, notifying them that he expected to have an order to them "by a week from tomorrow."

17. A month later, Mr. Feit emailed Respondent on August 26, 2015 asking for the status of the order. Respondent did not reply.

18. On December 3, 2015, more than three years after the hearing on permanent child support, Mr. Feit emailed Respondent asking for Respondent to communicate with the attorneys as to the status of the ruling. Respondent did not reply.

19. On April 18, 2016, Mr. Feit emailed Respondent a final time requesting the order. Respondent immediately replied that "there is not a day, and seldom a night, that goes by that this case has not been on my mind. I understand your clients [sic] needs." Despite this assertion, Respondent again failed to make any ruling.

20. After the last effort to secure a ruling in April 2016 (three and a half years after the hearing), and out of concern that further contact was futile and could harm his client's interests, Mr. Feit ceased contacting Respondent regarding the ruling.

21. Over a year after this last effort by Mr. Feit, and almost five years after the November 2012 hearing, on October 16, 2017, the Domestic Unit Supervisor in the Mecklenburg County Clerk's Office emailed the attorneys in the *Ives* matter asking if Respondent had ever made a decision on permanent child support and notifying them that the court file was missing. Mr. Feit confirmed that no order had been entered because Respondent never made a ruling.

22. To date, the official *Ives* court file remains missing after being checked out by a deputy clerk on November 30, 2012 for the final day of the permanent child support hearing. Respondent acknowledges that he had in his possession an exhibit folder from the November 2012 hearing, but had been unable to locate the remainder of the file.

> 23. On his own motion, Respondent entered an order of recusal from the *Ives* matter filed on November 21, 2017.
>
> 24. No ruling on permanent child support has issued since the matter was concluded in late November 2012.

(brackets in original) (citations to pages of the Stipulation omitted).

Based upon these findings of fact, the Commission concluded as a matter of law that:

> 1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."
>
> 2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
>
> 3. Canon 3 of the Code of Judicial Conduct governs a judge's discharge of his or her official duties. Canon 3A(5) requires a judge to "dispose promptly of the business of the court." Furthermore, Canon 3B(1) requires a judge to "diligently discharge the judge's administrative responsibilities" and "maintain professional competence in judicial administration."
>
> 4. The Commission's findings of fact, as supported by the Stipulation, show that since the *Ives* matter was concluded on November 30, 2012, no ruling has yet to be issued and Respondent has offered no justification for the delay. These facts, coupled with the fact that the file remains missing, continues [sic] to harm the interests of the litigants in the *Ives* matter.
>
> 5. Upon the Commission's independent review of the stipulated facts concerning Respondent's unreasonable

and unjustified delay in issuing the ruling, the Commission concludes that Respondent:

a. failed to personally observe appropriate standards of conduct necessary to ensure that the integrity of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct;

b. failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct;

c. failed to dispose promptly of the business of the court, in violation of Canon 3A(5) of the North Carolina Code of Judicial Conduct;

d. and failed to diligently discharge his administrative responsibilities and maintain professional competence in judicial admin-istration in violation of Canon 3B(1) of the North Carolina Code of Judicial Conduct.

6. The Commission also notes that Respondent agreed in the Stipulation that he violated the foregoing provisions of the North Carolina Code of Judicial Conduct by (1) failing to issue a ruling for more than five (5) years on the motion for permanent child support without justification, (2) failing to respond to legitimate requests from counsel as to the status of the order, (3) representing to counsel that he was diligently working on the ruling when he was not; and (4) recusing himself from the case instead of entering an order thereby causing further delay.

7. The Commission further concludes that Respondent's violations of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.").

(brackets in original) (citations to pages of the Stipulation omitted)

Based on these Findings of Fact and Conclusions of Law, the Commission recommended that this Court suspend Respondent without pay for a period of thirty days. The Commission based this recommendation on its earlier findings and conclusions and the following additional dispositional determinations:

> 1. As a mitigating factor, Respondent has in the past enjoyed the high regard of the legal community. As set forth in the Stipulation, Respondent ranked first in overall performance among twelve district judges in District Court Division 26 in the 2012 North Carolina Bar Association survey, and fourth among eleven district judges in the 2015 survey. An additional mitigating factor is his volunteer work on behalf of the justice system. He currently is in his ninth year of volunteering to attend Truancy Court one morning a week at low performing schools. He also was a participant in the first Domestic Violence Fatality Review team in North Carolina, serving on panels in Mecklenburg County for several years that reviewed instances of death related to apparent domestic violence. Respondent also offered at the hearing of this matter a letter of support from Attorney George V. Laughrun, II of the firm Goodman, Carr, Laughrun, Levine & Greene, PLLC in Charlotte, North Carolina.
>
> 2. As an additional mitigating factor, Respondent agreed to enter into the Stipulation to bring closure to this matter and because of his concern for protecting the integrity of the court system. Respondent also understands the negative impact his actions have had on the integrity and impartiality of the judiciary. Respondent was cooperative with the Commission's investigation, voluntarily providing information about the incident and fully and openly admitting error and remorse.
>
> 3. Nevertheless, the misconduct set out in this Recommendation is aggravated by the fact that Respondent received a private letter of caution from the Commission on March 11, 2013 after Respondent unreasonably delayed entering an adjudicative order in a different domestic action for thirteen (13) months. Respondent was warned that recurrence of such conduct may result in further proceedings before the Commission. Respondent received this letter of caution while the *Ives*

matter (the subject of this proceeding) was under advisement. Notwithstanding the Commission's warning about unreasonable delay, Respondent engaged in the egregious delay in the present case.

4. The Commission also finds that Respondent fails to appreciate the magnitude of the harm caused by his misconduct. At the hearing of this matter, and notwithstanding his agreement to accept a stated disposition of suspension without pay for 30 days, Respondent through Counsel asserted to the Commission that a lesser sanction would be more appropriate. The Commission rejects that assertion, and but for the Stipulation and Agreement for Stated Disposition, which obviated the need for a lengthy and expensive contested hearing, would have recommended a higher sanction to the Supreme Court.

5. The Commission and Respondent acknowledge the ultimate jurisdiction for the discipline of judges is vested in the North Carolina Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendation from the Commission.

6. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all seven Commission members present at the hearing of this matter concur in this recommendation to **suspend Respondent without pay for a period of 30 days.**

(emphasis in original) (citations to pages of the Stipulation omitted)

In resolving this matter, we observe that "[t]he Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court' when reviewing a recommendation from the Commission." *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order) (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008) (order)). Neither the Commission's findings of fact nor its conclusions of law are binding on this Court, but may be adopted by the Court if they are supported by clear and convincing evidence. *Id.* If the Commission's findings are adequately supported by clear and convincing evidence, the Court must determine whether those findings support the Commission's conclusions of law. *Id.* at 429, 722 S.E.2d at 503.

The Commission found the stipulated facts to be supported by "clear, cogent and convincing evidence." Respondent executed the Stipulation and agreed that those facts and information would serve as the evidentiary and factual basis for the Commission's recommendation. Respondent does not contest any of the findings or conclusions made by the Commission. After careful review, we agree that the Commission's findings are supported by clear, cogent, and convincing evidence, and we now adopt them as our own. Furthermore, we agree with the Commission's conclusions that Respondent's conduct violates Canons 1, 2A, 3A(5) and 3B(1) of the North Carolina Code of Judicial Conduct, and is prejudicial to the administration of justice, thus bringing the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This Court is free to exercise its own judgment in arriving at a disciplinary decision in light of Respondent's violations of several canons of the North Carolina Code of Judicial Conduct and is not bound by the recommendations of the Commission. *Id.* Accordingly, "[w]e may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction." *Id.* The Commission recommended that Respondent be suspended without compensation from the performance of his judicial duties for a period of thirty days. Respondent does not contest the Commission's findings of fact or conclusions of law and voluntarily entered into the Stipulation with the understanding that the Commission's recommendation would be suspension from his judicial duties for a period of thirty days without compensation.

We are mindful of Respondent's high regard in the legal community and of his volunteer activities within the judicial system. We also appreciate Respondent's cooperation with the Commission's investigation, including his voluntary provision of information when requested, his admission of error and expression of remorse, and his willingness to enter into the Stipulation to bring this matter to a close. Respondent has demonstrated an understanding of the negative effect of his actions on the integrity and impartiality of the judiciary. Nevertheless, the misconduct set out in the facts of this case is aggravated by the finding that Respondent received a private letter of caution from the Commission on 11 March 2013, while he had the *Ives* matter under advisement, after he had unreasonably delayed entering an order in a different domestic action for thirteen months. He was warned at that time that recurrence of such conduct could result in further proceedings before the Commission. Notwithstanding his receipt of the Commission's warning about unreasonable delay, he engaged in the egregious delay in the present case. Weighing the severity of his conduct against his candor and

cooperation, we conclude that the Commission's recommended thirty-day suspension without compensation is appropriate. At the conclusion of his suspension, Respondent may resume the duties of his office.

Therefore, the Supreme Court of North Carolina orders that Respondent Ronald L. Chapman be, and is hereby, SUSPENDED WITHOUT COMPENSATION from office as a Judge of the General Court of Justice, District Court Division Twenty-six, for THIRTY days from the entry of this order for conduct in violation of Canons 1, 2A, 3A(5), and 3B(1) of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 26th day of October, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of October, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

MEINCK v. CITY OF GASTONIA

[371 N.C. 497 (2018)]

JOAN A. MEINCK
v.
CITY OF GASTONIA, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 130PA17

Filed 26 October 2018

1. Immunity—governmental—downtown redevelopment—art center—negligence claim

The trial court correctly granted summary judgment for defendant city on the basis of governmental immunity in a negligence case arising from a slip and fall at an art center used as a part of a downtown redevelopment. An urban redevelopment project undertaken in accordance with statutes and for the purpose of promoting the health, safety, and welfare of the inhabitants of the State of North Carolina is a governmental function.

2. Immunity—governmental—downtown redevelopment—art center—governmental function

The trial court correctly determined that defendant city was engaged in a governmental function and granted summary judgment for defendant on the basis of governmental immunity in a negligence case arising from a slip and fall at an art center used as a part of a downtown redevelopment. While the legislature has not deemed that all urban redevelopment and downtown revitalization projects are governmental functions that are immune from suit, defendant's activity here in leasing the property to an arts guild to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental function.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 417 (2017), reversing and remanding an order granting summary judgment entered on 1 June 2016 by Judge Lisa Bell in Superior Court, Gaston County. On 8 June 2017, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 6 February 2018.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellee/appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Aaron C. Low, for defendant-appellant/appellee.

Martin & Jones, PLLC, by Huntington M. Willis; and Terpening Wilder Law, by William R. Terpening, for North Carolina Advocates for Justice, amicus curiae.

Clawson and Staubes, PLLC, by Andrew J. Santaniello; and Kimberly S. Hibbard, NCLM General Counsel, and Gregory F. Schwitzgebel III, NCLM Associate General Counsel, for North Carolina Association of Defense Attorneys and North Carolina League of Municipalities, amici curiae.

HUDSON, Justice.

Here we consider whether the trial court erred in granting a motion for summary judgment in favor of defendant, the City of Gastonia, based upon the doctrine of governmental immunity. The Court of Appeals concluded that governmental immunity did not apply and reversed the trial court's order granting summary judgment in favor of defendant. *Meinck v. City of Gastonia*, ___ N.C. App. ___, 798 S.E.2d 417 (2017). Because we conclude that defendant is entitled to governmental immunity, we reverse the decision of the Court of Appeals and remand this case to that court for further proceedings.

Background

In 2011 defendant purchased from Gaston County a historic building located at 212 West Main Avenue in downtown Gastonia. According to an affidavit and deposition testimony from defendant's city manager, Edward C. Munn, defendant had determined that this vacant building was in a "strategic location" for defendant's effort to redevelop and revitalize the downtown area, which was rife with vacant and deteriorating properties. According to Munn, "your downtown is your face. It is how you project your image to the rest of anyone who wants to do commerce or if you want to live there." Defendant's intent in purchasing the building was to preserve it "but also to put it into use" and "not [ ] allow it to be vacant and deteriorate." Defendant had further determined that, based on other successful examples throughout the country, one of the "key pieces" necessary for revitalization was "bringing artists into the downtown" and into the older buildings with the idea that the downtown area would thus become more attractive for businesses and people.

To that end, defendant began leasing the property to "nonprofit arts groups," first to the Gaston County Arts Council, Inc. from 2011 to 2013, and then, beginning in mid-2013, to the Gaston County Art Guild (the

Art Guild). As with the nearly identical first lease agreement, the lease agreement between defendant and the Art Guild (the lease) provided that the Art Guild was to sublease portions of the building to individual artists (the subtenants) to use as studios—a cooperative enterprise[1] referred to as "Arts on Main." Under the lease defendant was responsible for maintaining the exterior of the premises and also had the right to inspect the property at any time.[2] The lease required the Art Guild to use the property "only for purposes of an art gallery and artists' studios and a gift shop" and required the subtenants to use the property only for creating and selling works of art. The lease fixed the rents to be paid by subtenants for the studio spaces at a range of $90.00 to $375.00 per month and provided that all art sales made at the property were subject to a 30% commission.

Under the lease defendant received 90% of all rents paid by the subtenants and 15% of "the gross receipts from all sales or commissions occurring on" the property.[3] In addition, the lease required the subtenants to provide as consideration a minimum of fifteen hours per month of volunteer time tending the gallery and gift shop, and subtenants were expected to provide additional volunteer time necessary for the operation of Arts on Main as a "viable operation." In the 2013 fiscal year, defendant's revenues received from the rents and sales or commissions amounted to $21,572.98. Defendant's expenditures for that year totaled $33,062.01, which netted a loss of $11,489.03 for 2013. In the 2014 fiscal year, defendant's revenues from the rents and sales or commissions totaled $21,935.57 and its expenditures totaled $40,008.13, netting defendant a loss of $18,072.56. Additionally, Munn testified that defendant spent money on labor and overhead but did not include those items in its financial spreadsheet. According to Munn, the city did not seek to make a profit from the lease with the Art Guild and "there's no profit in this operation."

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1. While one attachment to the lease described Arts on Main as "a cooperative business," Munn testified that it was more accurately characterized as "a non-profit cooperative effort to promote the arts."

2. The subtenants' studio spaces were subject to inspection during normal business hours.

3. The Court of Appeals erroneously stated that the lease "guaranteed Defendant 30% of the gross sales receipts received for art the Art Guild sold on the premises." *Meinck*, ___ N.C. App. at ___, 798 S.E.2d at 420. The lease subjected art sold by subtenants on the property to a minimum 30% commission, but under the lease defendant only received "an amount equal to 15% of the gross receipts from all sales or commissions occurring on the Premises." Presumably, the Art Guild was entitled to the other portion of commissions.

On 11 December 2013, plaintiff, who was one of the subtenants of the Art Guild, was leaving the building through a rear exit carrying a stack of large pictures when she lost her balance on a set of steps and fell. Evidence tended to show that part of the concrete steps had eroded. Plaintiff suffered a broken hip and other injuries as a result of her fall, and she "required emergency medical treatment, surgery, hospitalization, and substantial rehabilitation." On 4 February 2015, plaintiff filed a complaint against defendant alleging that defendant was negligent in failing to maintain the building's exit in a reasonably safe condition and failing to warn of the dangerous and hazardous condition of the exit. Plaintiff's complaint alleged that defendant had waived any claim of governmental immunity by purchasing liability insurance and also that defendant's tortious conduct occurred while defendant was engaged in a proprietary function, thereby depriving defendant of governmental immunity.

On 12 January 2016, defendant filed a motion for summary judgment asserting that the city was entitled to governmental immunity, that defendant was not negligent as a matter of law, and that plaintiff was contributorily negligent as a matter of law. The trial court determined that defendant's liability insurance policy "contained an express nonwaiver provision" and therefore, defendant had not waived any claim of governmental immunity. The trial court further concluded that "the City leased the property to the Art Guild as part of its governmental function to revitalize the downtown area, preserve a historical structure, and prevent deterioration of the downtown area" and accordingly, was "entitled to governmental immunity regarding Plaintiff's claims." On that basis, the trial court granted summary judgment for defendant. Additionally, the trial court determined that, although the issue was moot in light of the court's ruling on immunity, the court would deny defendant's motion for summary judgment based on plaintiff's contributory negligence. Plaintiff appealed this order to the Court of Appeals.

At the Court of Appeals plaintiff argued that defendant's ownership and maintenance of the building leased to the Art Guild as part of defendant's downtown revitalization efforts was a proprietary function and not a governmental function; therefore, defendant was not entitled to governmental immunity. The Court of Appeals agreed, noting first that governmental immunity applies only if a municipality is engaging in a governmental function, as opposed to a proprietary function. *Meinck*, ___ N.C. App. at ___, 798 S.E.2d at 421. The court stated that the "threshold inquiry" in making the distinction between governmental and proprietary functions is "whether, and to what degree, the legislature has

addressed the issue." *Id.* at ___, 798 S.E.2d at 421 (quoting *Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 200, 732 S.E.2d 137, 141-42 (2012)). The court determined that the legislature did not specify in N.C.G.S. § 160A-272, which authorizes cities to lease property to private parties, whether such activity is governmental or proprietary. *Id.* at ___, 798 S.E.2d at 421. Here the Court of Appeals also recognized that N.C.G.S. § 160A-535 authorizes cities to establish municipal service districts for the purpose of downtown revitalization projects like the one engaged in by defendant here but determined that "[n]owhere has the legislature deemed all downtown revitalization projects undertaken by a city within a service district to be activities[ ] which are exempt from suit through governmental immunity." *Id.* at ___, 798 S.E.2d at 421. Addressing the next inquiry, which is whether an activity "can only be provided by a governmental agency or instrumentality," *id.* at ___, 798 S.E.2d at 421 (quoting *Williams*, 366 N.C. at 202, 732 S.E.2d at 142), the court determined that "[t]he ownership and maintenance of property leased to a private entity is not an activity[ ] which is provided only by a governmental agency or instrumentality," *id.* at ___, 798 S.E.2d at 421-22.

The Court of Appeals then addressed additional factors, including "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at ___, 798 S.E.2d at 422 (quoting *Williams*, 366 N.C. at 202-03, 732 S.E.2d at 143 (footnotes omitted)). The court determined that defendant's activity here is not one "solely and traditionally provided by a governmental entity." *Id.* at ___, 798 S.E.2d at 422. Further, in reliance on *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957), the court determined that, although defendant's revenues from the rents and sales or commissions did not cover its operating costs and were far exceeded by its expenditures, the revenues were "substantial" and provided "such a pecuniary advantage to exclude the application of government immunity as a matter of law," *id.* at ___, 798 S.E.2d at 422 (citing *Glenn*, 246 N.C. at 476-77, 98 S.E.2d at 918-19). The court held that "[i]n light of all these factors," defendant was not entitled to governmental immunity, *id.* at ___, 798 S.E.2d at 422, and it thus reversed the trial court's entry of summary judgment in favor of defendant on that basis, *id.* at ___, 798 S.E.2d at 424. Having reached this conclusion, the court did not address plaintiff's argument that defendant's non-waiver provision in its liability insurance contract did not effectively preserve defendant's governmental immunity.

Additionally, the court addressed the parties' arguments on negligence and contributory negligence. *Id.* at ___, 798 S.E.2d at 422-24. The court determined that "Plaintiff's forecast of evidence is sufficient to raise the genuine issues of material fact of whether Defendant negligently failed to maintain the steps on which Plaintiff tripped or acted negligently in failing to warn about the condition of the steps." *Id.* at ___, 798 S.E.2d at 423. Moreover, the court determined that "a jury could find Plaintiff . . . acted reasonably in using the exit with the hazardous steps" because "[n]o evidence of other means of exiting the building was presented" and "[t]he carrying of large pictures out of the art gallery is a reasonable, non-negligent use of the exit." *Id.* at ___, 798 S.E.2d at 424. Accordingly, the court concluded that defendant was not entitled to summary judgment on the issue of plaintiff's contributory negligence. *Id.* at ___, 798 S.E.2d at 424.

On 20 April 2017, defendant filed a petition for discretionary review seeking review of the decision of the Court of Appeals that concluded that governmental immunity did not apply and that plaintiff was not contributorily negligent as a matter of law. Plaintiff filed a conditional petition for discretionary review on 28 April 2017 also seeking review of the issue of plaintiff's contributory negligence. This Court allowed both petitions on 8 June 2017.

Analysis

[1] Defendant argues that the Court of Appeals erred in reversing the trial court's order granting summary judgment for defendant on the basis of governmental immunity. We agree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). We review a trial court's order denying a motion for summary judgment de novo. *E.g.*, *Bynum v. Wilson County*, 367 N.C. 355, 358, 758 S.E.2d 643, 645 (2014) (citing *Williams*, 366 N.C. at 198, 732 S.E.2d at 140). We review decisions of the Court of Appeals for errors of law. *E.g.*, *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citing N.C. R. App. P. 16(a)).

"Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of *governmental functions* absent waiver of immunity.' " *Williams*, 366 N.C. at 198, 732 S.E.2d at 140 (emphasis added) (quoting

Evans ex rel. Horton v. Hous. Auth. Of Raleigh, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)). When, however, a county or municipality is engaged in a "*proprietary function*," governmental immunity does not apply. *Id.* at 199, 732 S.E.2d at 141 (emphasis added) (citing *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951)). As a result, the determination of "whether an entity is entitled to governmental immunity . . . turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Id.* at 199, 732 S.E.2d at 141.

In *Williams* we addressed this distinction between governmental and proprietary functions, noting that:

> We have long held that a "governmental" function is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). A "proprietary" function, on the other hand, is one that is "commercial or chiefly for the private advantage of the compact community." *Id.*[at 450, 73 S.E.2d at 293]; *see also Evans*, 359 N.C. at 54, 602 S.E.2d at 671 (describing the test set forth in *Britt* as our "one guiding principle").
>
> Our reasoning when distinguishing between governmental and proprietary functions has been relatively simple, though we have acknowledged the difficulties of making the distinction. *Evans*, 359 N.C. at 54, 602 S.E.2d at 671 ("The difficulties of applying this principle have been noted." (citations omitted)). "When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Britt*, 236 N.C. at 450-51, 73 S.E.2d at 293.

Id. at 199-200, 732 S.E.2d at 141 (citation omitted). Furthermore, to aid in making this distinction, we recognized that "[o]ur case law demonstrates that a number of factors are relevant when ascertaining whether action undertaken by a county or municipality is governmental or proprietary in nature." *Id.* at 200, 732 S.E.2d at 141.

First, we concluded that "the threshold inquiry . . . is whether, and to what degree, the legislature has addressed the issue." *Id.* at 200, 732

S.E.2d at 141-42; *see id.* at 200-01, 732 S.E.2d at 142 ("This is especially so given . . . that any change in the common law doctrine of governmental immunity is a matter for the legislature." (citation omitted)). Recognizing that even the legislature's designation of a general activity as a governmental function may not be dispositive on the specific facts of a case, we stated that "[w]hen the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant." *Id.* at 202, 732 S.E.2d at 142. The first of these additional factors is whether "the undertaking is one in which ***only*** a governmental agency could engage," in which case "it is perforce governmental in nature." *Id.* at 202, 732 S.E.2d at 142 (citations omitted). Acknowledging that in more recent years this determination had become "increasingly difficult" because "many services once thought to be the sole purview of the public sector have been privatized in full or in part," we continued, stating that

> when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider. We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. Nevertheless, we note that the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice. We therefore caution against overreliance on these four factors.

Id. at 202-03, 732 S.E.2d at 143 (footnotes omitted). Finally, we emphasized that "the proper designation of a particular action of a county or municipality is a fact intensive inquiry" and "may differ from case to case." *Id.* at 203, 732 S.E.2d at 143.

Here it is undisputed that the activity out of which defendant's alleged tortious conduct arose was defendant's leasing of the property at 212 West Main Avenue to the Art Guild. It is further undisputed that defendant purchased this historic and vacant property and entered into the lease as part of its efforts at urban redevelopment and downtown revitalization. With regard to the "threshold inquiry" under *Williams*, *id.*

at 200, 732 S.E.2d at 141-42, several statutes are relevant to the activity in which defendant was engaged.

First, N.C.G.S. § 160A-272 authorizes a city to lease or rent any property it owns "but not for longer than 10 years . . . and only if the council determines that the property will not be needed by the city for the term of the lease." N.C.G.S. § 160A-272(a) (2017). This statute requires the lease or rental agreement to be authorized by a resolution "adopted at a regular council meeting upon 30 days' public notice." *Id.* § 160A-272(a1) (2017).[4] Nothing in this statute indicates any intent by the legislature to designate the leasing of property authorized therein as a governmental or proprietary function. As a result, we conclude that the legislature has not addressed whether the leasing by a city of its unused property is generally a governmental or proprietary function. Additional statutes, however, are more specific to the activity engaged in by defendant here.

In Article 22 of Chapter 160A (the Urban Redevelopment Law), the legislature addressed the problem of "blighted areas" and authorized municipalities to engage in "redevelopment projects" in the interest of public health, safety, convenience, and welfare. N.C.G.S. §§ 160A-500 to -526 (2017). In N.C.G.S. § 160A-501 the legislature made the following findings:

> (1) That there exist in urban communities in this State blighted areas as defined herein.
>
> (2) That such areas are economic or social liabilities, inimical and injurious to the public health, safety, morals and welfare of the residents of the State, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby depreciating further the general community-wide values.
>
> (3) That the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of

4. "No public notice . . . need be given for resolutions authorizing leases or rentals for terms of one year or less, and the council may delegate to the city manager or some other city administrative officer authority to lease or rent city property for terms of one year or less." N.C.G.S. § 160A-272(b) (2017).

> juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities, constitutes an economic and social liability, substantially impairs or arrests the sound growth of communities.
>
> (4) That the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted.
>
> (5) That the acquisition, preparation, sale, sound replanning, and redevelopment of such areas in accordance with sound and approved plans for their redevelopment will promote the public health, safety, convenience and welfare.

Id. Accordingly, the legislature

> hereby declared [it] to be the policy of the State of North Carolina to promote the health, safety, and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as redevelopment commissions, which shall exist and operate for the public purposes of acquiring and replanning such areas and of holding or disposing of them in such manner that they shall become available for economically and socially sound redevelopment. Such purposes are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain.

Id. The legislature made additional findings in N.C.G.S. § 160A-502, providing:

> (1) That the cities of North Carolina constitute important assets for the State and its citizens; that the preservation of the cities and of urban life against physical, social, and other hazards is vital to the safety, health, and welfare of the citizens of the State, and sound urban development in the future is essential to the continued economic development of North Carolina, and that the creation, existence, and growth of substandard areas present substantial hazards to the

cities of the State, to urban life, and to sound future urban development.

(2) That blight exists in commercial and industrial areas as well as in residential areas, in the form of dilapidated, deteriorated, poorly ventilated, obsolete, overcrowded, unsanitary, or unsafe buildings, inadequate and unsafe streets, inadequate lots, and other conditions detrimental to the sound growth of the community; that the presence of such conditions tends to depress the value of neighboring properties, to impair the tax base of the community, and to inhibit private efforts to rehabilitate or improve other structures in the area; and that the acquisition, preparation, sale, sound replanning and redevelopment of such areas in accordance with sound and approved plans will promote the public health, safety, convenience and welfare.

(3) That not only is it in the interest of the public health, safety, convenience and welfare to eliminate existing substandard areas of all types, but it is also in the public interest and less costly to the community to prevent the creation of new blighted areas or the expansion of existing blighted areas; that vigorous enforcement of municipal and State building standards, sound planning of new community facilities, public acquisition of dilapidated, obsolescent buildings, and other municipal action can aid in preventing the creation of new blighted areas or the expansion of existing blighted areas; and that rehabilitation, conservation, and reconditioning of areas in accordance with sound and approved plans, where, in the absence of such action, there is a clear and present danger that the area will become blighted, will protect and promote the public health, safety, convenience and welfare.

Id.[5] In accordance with these findings and policies, the legislature authorized the governing bodies of municipalities to create a separate body to

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5. Again, the legislature made a declaration of policy, providing that

> it is hereby declared to be the policy of the State of North Carolina to protect and promote the health, safety, and welfare of the inhabitants of its urban areas by authorizing redevelopment commissions to undertake

act as a "redevelopment commission," N.C.G.S. § 160A-504(a), or to simply "undertake to exercise such powers, duties, and responsibilities [of a redevelopment commission] itself," *id.* § 160A-505(a).[6] These "public and essential governmental powers . . . include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this Article." *Id.* § 160A-512. The legislature also enumerated a nonexhaustive list of grants of authority under this Article:

> (3) To act as agent of the State or federal government or any of its instrumentalities or agencies for the public purposes set out in this Article;
>
> (4) To prepare or cause to be prepared and recommend redevelopment plans to the governing body of the municipality and to undertake and carry out "redevelopment projects" within its area of operation;
>
> . . . .
>
> (6) Within its area of operation, to purchase, obtain options upon, acquire by gift, grant, devise, eminent domain or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project, except that eminent domain may only be used to take a blighted parcel; to hold, improve, clear or prepare for redevelopment any such property, and subject to the provisions of G.S. 160A-514, and with the approval of the local governing body sell, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein, either as an entirety to a single "redeveloper" or in parts to several redevelopers; provided

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> nonresidential redevelopment in accord with sound and approved plans and to undertake the rehabilitation, conservation, and reconditioning of areas where, in the absence of such action, there is a clear and present danger that the area will become blighted.

N.C.G.S. § 160A-502.

6. A municipality may also "designate a housing authority created under the provisions of Chapter 157 [Housing Authorities and Projects] to exercise the powers, duties, and responsibilities of a redevelopment commission." N.C.G.S. § 160A-505(a).

> that the commission finds that the sale or other transfer of any such part will not be prejudicial to the sale of other parts of the redevelopment area, nor in any other way prejudicial to the realization of the redevelopment plan approved by the governing body; to enter into contracts, either before or after the real property that is the subject of the contract is acquired by the Commission (although disposition of the property is still subject to G.S. 160A-514), with "redevelopers" of property containing covenants, restrictions, and conditions regarding the use of such property for residential, commercial, industrial, recreational purposes or for public purposes in accordance with the redevelopment plan and such other covenants, restrictions and conditions as the commission may deem necessary to prevent a recurrence of blighted areas or to effectuate the purposes of this Article; to make any of the covenants, restrictions or conditions of the foregoing contracts covenants running with the land, and to provide appropriate remedies for any breach of any such covenants or conditions, including the right to terminate such contracts and any interest in the property created pursuant thereto; to borrow money and issue bonds therefor and provide security for bonds; to insure or provide for the insurance of any real or personal property or operations of the commission against any risks or hazards, including the power to pay premiums on any such insurance; and to enter into any contracts necessary to effectuate the purposes of this Article;
>
> . . . .
>
> (11) To make such expenditures as may be necessary to carry out the purposes of this Article; and to make expenditures from funds obtained from the federal government[.]

Id. Plaintiff does not dispute that defendant's purchase of the vacant property at 212 West Main Avenue and its lease of the property to the Art Guild in order to promote the arts for the purpose of revitalizing the downtown area is a valid redevelopment activity under the Urban Redevelopment Law.

Also relevant to the activity at issue here is Article 23, the "Municipal Service District Act of 1973" (the Municipal Service District Act), N.C.G.S. §§ 160A-535 to -544 (2017), which allows cities to establish "service districts in order to finance, provide, or maintain for the districts one or more of the following services, facilities, or functions in addition to or to a greater extent than those financed, provided or maintained for the entire city," *id.* § 160A-536(a). These services include "[d]owntown revitalization projects," *id.* § 160A-536(a)(2), which overlap with the activities authorized by the Urban Redevelopment Law, and are defined as

> improvements, services, functions, promotions, and developmental activities intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area. Exercise of the authority granted by this Article to undertake downtown revitalization projects financed by a service district do not prejudice a city's authority to undertake urban renewal projects in the same area. Examples of downtown revitalization projects include by way of illustration but not limitation all of the following:
>
> . . . .
>
> (7) Sponsoring festivals and markets in the downtown area, promoting business investment in the downtown area, helping to coordinate public and private actions in the downtown area, and developing and issuing publications on the downtown area.

Id. § 160A-536(b). Plaintiff argues in her brief that defendant's activity here is not a valid downtown revitalization project because it does not meet any of the "categories of conduct" defined by the legislature in subsection 160A-536(b). We disagree, and we conclude there is no genuine issue of material fact with respect to this issue. Plaintiff neglects to mention that the "categories" enumerated in the statute are mere examples and are explicitly nonexhaustive. *See id.* § 160A-536(b) (providing that "[e]xamples of downtown revitalization projects include by way of illustration but not limitation all of the following"). We conclude that the uncontroverted evidence presented in the trial court establishes that defendant's activity is a valid "service[ ], function[ ], promotion[ ], [or] developmental activit[y] intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area." *Id.* We further conclude that defendant's activity falls

under the example in subdivision (7) in that defendant's "Arts on Main" project is a cooperative public and private initiative wherein a market is established to sell and promote the arts in the downtown area.

In its analysis of the threshold inquiry, the Court of Appeals below briefly mentioned the Municipal Service District Act before concluding that "[n]owhere has the legislature deemed all downtown revitalization projects undertaken by a city within a service district to be activities[ ] which are exempt from suit through governmental immunity." *Meinck*, ___ N.C. App. at ___, 798 S.E.2d at 421. This portion of the court's analysis, which notably omitted any mention of the Urban Redevelopment Law, tends to suggest that a legislative provision that addresses a particular activity but does not explicitly provide that such activity is a governmental function immune from suit has no bearing on a determination of whether the activity is governmental or proprietary. The inquiry, however, is not merely whether the legislature has explicitly provided that a specific activity is governmental but rather, "*whether, and to what degree*, the legislature has addressed the issue." *Williams*, 366 N.C. at 200, 732 S.E.2d at 142 (emphasis added).

For example, in *Williams*, while we reserved comment on whether a statute at issue there was "ultimately determinative in light of the facts at hand" and left that determination to the trial court upon remand, we did note that the statute at issue was, at a minimum, "clearly relevant" to whether the defendants' activity was governmental or proprietary. *Id.* at 201, 732 S.E.2d at 142 (emphases omitted). Furthermore, in arriving at our conclusion in *Williams* that the "threshold inquiry" was the extent to which the legislature had addressed the issue, we discussed as an example *Evans*, in which the Court "considered the Housing Authorities Law in holding that a housing authority was protected by governmental immunity against allegations of lead paint-based injuries." *Id.* at 200, 732 S.E.2d at 141 (internal citation omitted) (citing *Evans*, 359 N.C. at 55-56, 602 S.E.2d at 671-72). Notably, the plaintiff in *Evans* argued that the defendant was not immune "because the Housing Authorities Law does not *specifically provide* for immunity." *Evans*, 359 N.C. at 54, 602 S.E.2d at 671 (emphasis added). We rejected that argument, noting that

> in enacting the Housing Authorities Law at issue, the General Assembly provided
>
> > "that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State . . .; that these conditions cannot be remedied by the ordinary operation of private enterprise;

> that the . . . providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private property acquired; . . . and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest."

Id. at 55, 602 S.E.2d at 672 (alterations in original) (citing N.C.G.S. § 157-2(a) (2003)). We considered the emphasized language a significant "statutory indication that the provision of low and moderate income housing is a governmental function." *Id.*

Williams, 366 N.C. at 200, 732 S.E.2d at 141. Based on this "statutory indication," in conjunction with our prior case law interpreting the original Housing Authorities Law, as well as the principle "that an 'activity of the municipality which is . . . public in nature and performed for the public good in behalf of the State . . . comes within the class of governmental functions,' " *Evans*, 359 N.C. at 55-56, 602 S.E.2d at 671-72 (alterations in original) (quoting *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)), we determined that the defendant in *Evans* was entitled to governmental immunity on the facts of that case, *id.* at 56, 602 S.E.2d at 672. Thus, even when the legislature "has not directly resolved whether a specific activity is governmental or proprietary in nature," *Williams*, 366 N.C. at 202, 732 S.E.2d at 142, a legislative provision addressing the activity may still be relevant—in conjunction with the other *Williams* factors—to a determination of whether an activity is governmental, particularly if the statutory language suggests "a significant 'statutory indication' that the [activity] is a governmental function," *id.* at 200, 732 S.E.2d at 141 (quoting *Evans*, 359 N.C. at 55, 602 S.E.2d at 672).

In that regard, we note that certain language from the Urban Redevelopment Law is similar in significant respects to the emphasized language from the Housing Authorities Law in *Evans*. *Compare* N.C.G.S. § 160A-501 (providing that "the public purposes of acquiring and replanning [blighted] areas and of holding or disposing of them in such manner that they shall become available for economically and socially sound redevelopment . . . . are hereby declared to be *public uses for which public money may be spent*" (emphasis added)), *with Evans*, 359 N.C. at 55, 602 S.E.2d at 672 ("[T]he . . . providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private

property acquired . . . ." (first ellipsis in original) (quoting N.C.G.S. § 157-2(a) (2003) (emphasis added))). Moreover, in both enactments the legislature recognized a serious problem that could not be adequately remedied by private enterprise alone. *Compare* N.C.G.S. § 160A-501(4) (providing that "the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted"), *with Evans*, 359 N.C. at 55, 602 S.E.2d at 672 ("[T]hese conditions cannot be remedied by the ordinary operation of private enterprise . . . ." (quoting N.C.G.S. § 157-2(a))). Additionally, both the Urban Redevelopment Law and the Municipal Service District Act establish that downtown revitalization is—like the provision of low and moderate income housing under the Housing Authorities Law—in the public interest. *Compare* N.C.G.S. § 160A-502(3) (providing that "not only is it in the interest of the public health, safety, convenience and welfare to eliminate existing substandard areas of all types, but it is also in the public interest and less costly to the community to prevent the creation of new blighted areas or the expansion of existing blighted areas"), *and id.* § 160A-536(b) (providing that " 'downtown revitalization projects' are improvements, services, functions, promotions, and developmental activities intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area"), *with Evans*, 359 N.C. at 55, 602 S.E.2d at 672 ("[T]he necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest." (quoting N.C.G.S. § 157-2(a))). We conclude that these provisions of the Urban Redevelopment Law and the Municipal Service District Act are statutory indications that an urban redevelopment project undertaken in accordance with these statutes and for the purpose of "promot[ing] the health, safety, and welfare of the inhabitants" of the State of North Carolina is a governmental function. N.C.G.S. § 160A-501; *see Williams*, 366 N.C. at 200, 732 S.E.2d at 141 (explaining that a municipality is "an agency of the sovereign" and engaged in a governmental function when it "is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens" (quoting *Britt*, 236 N.C. at 450, 73 S.E.2d at 293)).

[2] Nonetheless, as the Court of Appeals correctly recognized, the legislature has not deemed all urban redevelopment and downtown revitalization projects governmental functions that are immune from suit. Moreover, in *Williams* we recognized that even when the legislature has designated a general activity to be "a governmental function by statute, the question remains whether the specific [activity at issue], in this case

and under these circumstances, is a governmental function." 366 N.C. at 201, 732 S.E.2d at 142 (citation omitted). Thus, while the applicable statutory provisions are "clearly relevant," we conclude that the legislature has not "directly resolved" whether defendant's lease of 212 West Main Avenue to the Art Guild as part of its downtown revitalization efforts "is governmental or proprietary in nature," thus requiring us to examine "other factors [that] are relevant." *Id.* at 201-02, 732 S.E.2d at 142 (emphasis omitted).

The first of these additional factors inquires "if the undertaking is one in which only a governmental agency could engage," in which event "it is perforce governmental in nature." *Id.* at 202, 732 S.E.2d at 142 (emphasis omitted). Relevant to this consideration, although not dispositive, are the legislature's statements regarding the "economic or social liabilities" caused by "blighted areas," specifically "[t]hat the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and *cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted.*" N.C.G.S. § 160A-501(1), (2), (4) (emphasis added). Assuredly, this legislative finding does not preclude private entities from *engaging* in redevelopment projects and downtown revitalization activities, and a private entity could conceivably engage in the same activity as defendant did here. Thus, we cannot conclude that this legislative pronouncement is dispositive; that is, it does not render defendant's leasing of the property to the Art Guild in order to promote the arts for the purpose of urban redevelopment and downtown revitalization an "undertaking . . . in which ***only*** a governmental agency could *engage*." *Williams*, 366 N.C. at 202, 732 S.E.2d at 142 (second emphasis added). Nonetheless, we find the legislative determination that the *purposes* of urban redevelopment can be accomplished *only* when governmental agencies engage in such activities to be a relevant consideration under this factor, as well as another statutory indication that an activity undertaken for urban redevelopment and to promote the public interest is governmental in nature.

Because the particular activity here can be performed both publicly and privately, we consider "a number of additional factors," including "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at 202-03, 732 S.E.2d at 143 (footnotes omitted). Defendant argues that maintaining a historic and vacant building and leasing it to a nonprofit art guild is an undertaking that is not

traditionally provided by an entity other than a governmental agency or instrumentality. Yet, defendant has not pointed to any evidence or authority, nor are we aware of any, that supports this assertion.

We have evidence, however, of the fees charged and the costs incurred by defendant. Here the lease sets rental rates for the Art Guild's subtenants in a range of not more than $90.00 to $375.00 per month, of which 90% is paid to defendant. Furthermore, defendant receives 15% of all sales or commissions under the lease, and subtenants are required to provide additional consideration in the form of volunteer time, with a minimum of fifteen hours per month. For the 2013 fiscal year, defendant's revenues from the rent and sales or commissions amounted to $21.572.98. Defendant's expenditures for that year totaled $33,062.01, with the city's electric charges alone totaling $26,547.34. Thus, defendant netted a loss of $11,489.03 that year. Defendant's loss for the 2014 fiscal year was even greater, with defendant's revenues amounting to $21,935.57 and its expenditures totaling $40,008.13, netting defendant a loss of $18,072.56. In addition, Munn testified that defendant spent money on labor and overhead but did not include those items in its financial spreadsheet. Despite these losses, plaintiff asserts that defendant received "financial gain" and that defendant's financial spreadsheet reflects a "budget surplus," referring to the fact that defendant spent less than was budgeted for Arts on Main. But this "surplus" reflected in the spreadsheet would, if anything, seemingly support defendant's position because it demonstrates that defendant had budgeted for, and prepared to suffer, losses even greater than the considerable loss it actually incurred. As Munn testified, the city did not seek to make a profit from the lease with the Art Guild and "there's no profit in this operation." We conclude that the revenues received by defendant under the lease are not "substantial," particularly because such revenues were not designed even to "simply cover the operating costs of the service provider," nor did they do so in reality.[7] *Id.* at 202-03, 732 S.E.2d at 143.

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7. In reaching a different conclusion with respect to the revenues received by defendant, the Court of Appeals relied on *Glenn v. City of Raleigh*. In *Glenn*, which considerably predates our decision in *Williams*, the plaintiff was injured by a rock launched from a lawn mower being operated at Pullen Park, which was maintained by the defendant. *Id.* at 470-71, 98 S.E.2d at 914. It appears that the majority in *Glenn*, in reviewing the trial court's denial of a motion for nonsuit on the basis of governmental immunity, did not consider the defendant's evidence of the costs incurred in maintaining the park. *Id.* at 477, 98 S.E.2d at 919 ("Considering plaintiff's evidence in the light most favorable to him, and disregarding defendant's evidence which tends to establish another and a different state of facts, or which tends to impeach or contradict his evidence, which we are required to do on the motion for judgment of nonsuit, it is our opinion that the net revenue of $18,531.14 for the fiscal year 1 July 1952 to 30 June 1953 received by the city of Raleigh from the operation

Recognizing that the additional factors listed in *Williams* are not exhaustive, *id.* at 203, 732 S.E.2d at 143 ("[T]he distinctions between proprietary and governmental are fluid . . . . We therefore caution against overreliance on these four factors."), we also consider as relevant the particular and decidedly noncommercial nature of defendant's undertaking here. Art occupies a unique role in our society and our state, as evidenced by the legislature's tasking the Department of Natural and Cultural Resources in Chapter 143, Article 47 (Promotion of Arts), with various duties connected with promoting the arts in this state, including "[a]ssist[ing] local organizations and the community at large with needs, resources and opportunities in the arts" and "[a]ssist[ing] in bringing the highest obtainable quality in the arts to the State; promot[ing] the maximum opportunity for the people to experience, enjoy, and profit from those arts." N.C.G.S. § 143-406(2), (5) (2017).[8] Defendant's undertaking to promote the arts by bringing individual, local artists into the downtown area furthers these aims, which in turn dovetail with the overall goal of revitalizing the downtown area.

Plaintiff does not actually dispute that defendant's lease with the Art Guild for the purpose of promoting the arts was an earnest effort at redeveloping and revitalizing its downtown area or that defendant did not seek or obtain any profit from this activity. Rather, the thrust of plaintiff's argument is that case law dictates that the "lease of government property to third parties" is a proprietary function. This broad proposition is not supported by plaintiff's proffered authorities, none of which are binding on this Court. To the extent plaintiff relies upon this Court's decision in *Aaser v. City of Charlotte*, in which the Court held

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of Pullen Park for that period, which was used by the city for the capital maintenance of the park area, building items, paying salaries, buying fuel, etc., (the evidence that the $18,531.14 was spent in the amusement area only is the defendant's evidence), was such as to remove it, for the purposes of the consideration of a motion for judgment of nonsuit, from the category of incidental income, and to import such a corporate benefit or pecuniary profit or pecuniary advantage to the city of Raleigh as to exclude the application of governmental immunity." (citations omitted)). Whether or not the majority's decision to limit its review in this manner was procedurally correct, that is not the situation here, in which the trial court properly considered both parties' evidence on the motion for summary judgment—including defendant's evidence both of its revenue received and its costs incurred—in order to determine if there was a genuine issue of material fact.

8. The legislature also created the North Carolina Arts Council to assist the Department in this function, providing that the Council is to, *inter alia*, "advise the Secretary [of Natural and Cultural Resources] concerning assistance to local organizations and the community at large in the area of the arts" and "advise the Secretary in regard to bringing the highest obtainable quality in the arts to the State and promoting the maximum opportunity for the people to experience and enjoy those arts." N.C.G.S. § 143B-87(2), (5) (2017).

the activities at issue were proprietary, that case is easily distinguished. 265 N.C. 494, 144 S.E.2d 610 (1965). There we determined that "the holding of exhibitions and athletic events" at the defendant's hockey arena was "to produce revenue and [was] for the private advantage of the compact community," and therefore, the defendant was "engaging in a proprietary function when it operates such an arena, or leases it to the promoter of an athletic event, and when it operates refreshment stands in the corridors of the building for the sale of drinks and other items to the patrons of such an event." *Id.* at 497, 144 S.E.2d at 613 (citations omitted). Unlike here, the operation and leasing of the hockey arena was not an effort at revitalizing the defendant's downtown area, nor were there any relevant statutes indicating that the defendant's activity was governmental in nature, nor was there any discussion of the fees charged and whether they covered the defendant's operating costs. Furthermore, plaintiff's proposition would be contrary to our mandate that "the proper designation of a particular action of a county or municipality is a fact intensive inquiry . . . and may differ from case to case." *Williams*, 366 N.C. at 203, 732 S.E.2d at 143.

After careful consideration of all the factors set forth in *Williams*, we conclude that—in light of the statutory indications that urban redevelopment activities undertaken to promote the health, safety, and welfare of North Carolina citizens are governmental functions, and the legislative determination that urban blight "cannot be effectively dealt with by private enterprise" alone, as well as the uncontroverted evidence: that defendant's lease of the historic property to the nonprofit Art Guild in order to promote the arts in the downtown area was a valid urban redevelopment and downtown revitalization activity; that defendant did not seek to make a profit; and that the fees charged by defendant were not substantial and did not cover its operating costs—defendant's activity here in leasing the property to the Art Guild so as to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental function. Our decision should not be construed as holding that every urban redevelopment activity is a governmental function or even that every lease of historic property to a nonprofit arts group for the purpose of promoting the arts is a governmental function. Urban redevelopment and downtown revitalization activities defy straightforward definition, and such projects could seemingly cast a wide net encompassing a number of local government endeavors, many of which may be more commercial in nature or less geared towards remedying blighted areas and promoting the public interest than defendant's cooperative enterprise here with the Art Guild. We again emphasize that "the proper designation of a particular action of a county or municipality is

a fact intensive inquiry . . . and may differ from case to case." *Id.* at 203, 732 S.E.2d at 143; *see also id.* at 203, 732 S.E.2d at 143 ("[I]t does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose." (quoting *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975) (emphasis omitted))). Because we conclude that the trial court correctly determined that defendant was engaged in a governmental function, we reverse the decision of the Court of Appeals. Because the Court of Appeals determined that defendant was not entitled to governmental immunity, it did not address whether the trial court correctly ruled that defendant did not waive governmental immunity by purchasing liability insurance. We remand this case to the Court of Appeals to address that issue.

As a final matter, this Court allowed discretionary review of an issue raised by both parties—whether the Court of Appeals correctly determined that defendant is not entitled to summary judgment as a matter of law on the issue of plaintiff's contributory negligence. As to this issue, we hold that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD ARRINGTON

No. 280A17

Filed 26 October 2018

Criminal Law—plea agreement—sentencing worksheet—stipulation to classification of prior second-degree murder

Where defendant, as part of a plea agreement, stipulated to a sentencing worksheet showing his prior offenses, including a second-degree murder conviction designated as a B1 offense, the Court of Appeals erred by holding that the stipulation to this type of second-degree murder was an improper legal stipulation. Defendant could properly stipulate to the facts surrounding his offense either by recounting the facts at the hearing or by stipulating to a general second-degree murder conviction that has a B1 classification.

Defendant's stipulation was an acknowledgement that that the factual basis of his conviction involved general second-degree murder—a B1 offense—not covered by the B2 exceptions.

Justice ERVIN dissenting.

Justices HUDSON and BEASLEY join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 845 (2017), vacating a judgment entered on 14 September 2015 by Judge Alan Z. Thornburg in Superior Court, Buncombe County, setting aside defendant's plea agreement, and remanding the case for further proceedings. Heard in the Supreme Court on 14 March 2018.

Joshua H. Stein, *Attorney General*, *by Tracy Nayer*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for defendant-appellee.*

NEWBY, Justice.

This case addresses whether, as part of a plea agreement, a defendant can stipulate on his sentencing worksheet that a second-degree murder conviction justified a B1 classification. A defendant may properly stipulate to prior convictions. Defendant here stipulated to the sentencing worksheet showing his prior offenses, one of which was a second-degree murder conviction designated as a B1 offense. In so stipulating, defendant acknowledged that the factual basis of his conviction involved general second-degree murder (a B1 classification) and did not implicate the exception for less culpable conduct involving an inherently dangerous act or omission or a drug overdose (a B2 classification). Nevertheless, a majority at the Court of Appeals held that the stipulation to this type of second-degree murder was an improper legal stipulation. Because defendant properly stipulated to the facts underlying his conviction and the conviction itself, comparable to his stipulating to his other offenses on the worksheet, the decision of the Court of Appeals is reversed.

On 14 September 2015, defendant entered into a plea agreement, which required him to plead guilty to assault with a deadly weapon

inflicting serious injury, felony failure to appear, and having attained habitual felon status. Under the plea agreement, which defendant read and signed, the State consolidated the felony failure to appear charge into the assault with a deadly weapon charge, dismissed a second count of attaining habitual felon status, and allowed defendant to be sentenced in the mitigated range. On the sentencing worksheet, defendant stipulated to multiple previous offenses, including breaking and entering and larceny, possession of drug paraphernalia, assault on a female, driving while impaired, and breaking and entering a motor vehicle, in addition to second-degree murder. As a part of the plea agreement, defendant also stipulated that his 1994 second-degree murder conviction was accurately designated as a B1 offense.

At defendant's sentencing hearing, the court read defendant's plea agreement, which, as noted above, defendant had read and signed:

> The Court: The prosecutor, your attorney and you have informed the Court that the following includes all the terms and conditions of your plea, and I will read the plea arrangement to you now.
>
> The defendant stipulates that he has 16 points and is a Level V for habitual felon sentencing purposes. The state agrees that 14 CRS 267 will be consolidated for sentencing purposes into 13 CRS 63727. The defendant will be sentenced as an habitual felon in the mitigated range and the state will dismiss the charge of obtaining the status of habitual felon in 15 CRS 624.
>
> So does that include all the terms and conditions of your plea?
>
> The Defendant: Yes, sir.

Soon thereafter, the following exchange occurred:

> [Prosecutor]: . . . would the defendant stipulate to a factual basis and allow the state to summarize?
>
> [Defense Counsel]: We will so stipulate.
>
> [Prosecutor]: And would he also stipulate to the contents of the sentencing worksheet that was prepared for habitual sentencing purposes showing him to be a Level V for –

> [Defense Counsel]: We will stipulate to the sentencing sheet.

Defense counsel then conceded, "There's nothing I can deny about Mr. [Arrington's] record, absolutely nothing." The State later referenced defendant's prior second-degree murder conviction, noting that "[defendant] killed a nine-year-old child, shot a nine-year-old child to death. . . . He ended up pleading guilty to second-degree murder . . . ." Defendant did not attempt to explain further the facts of the second-degree murder conviction. After hearing from both parties, the judge determined that defendant had attained habitual felon status and sentenced him in the mitigated range, as agreed.

A divided panel of the Court of Appeals vacated the trial court's judgment and set aside defendant's guilty plea, holding that defendant improperly stipulated to a matter of "pure legal interpretation." *State v. Arrington*, ___ N.C. App. ___, ___, 803 S.E.2d 845, 849 (2017). The Court of Appeals reasoned that, because the legislature divided second-degree murder into two classifications after the date of defendant's second-degree murder offense, determining the appropriate classification of the offense would be a legal question that is thus inappropriate as the subject of a stipulation between the parties. *Id.* at ___, 803 S.E.2d at 848. The Court of Appeals opined that the analysis required here paralleled comparing elements of an out-of-state offense to the corresponding elements of a North Carolina offense, which this Court has determined to be an improper subject of a stipulation. *Id.* at ___, 803 S.E.2d at 849 (citing *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014)).

The dissent argued that defendant's stipulation to the second-degree murder conviction listed on his sentencing worksheet did not constitute an improper stipulation of law. *Id.* at ___, 803 S.E.2d at 852 (Berger, J., dissenting). The dissent asserted that, while the trial court must make the legal determination of defendant's prior record level, a defendant may stipulate to the existence of prior convictions and their classifications, which is what defendant did here. *Id.* at ___, 803 S.E.2d at 852. Thus, the dissent would have affirmed the trial court's judgment. *Id.* at ___, 803 S.E.2d at 852-53. The State filed notice of appeal based on the dissenting opinion.

Every criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts, thus making the conviction a mixed question of fact and law. In a jury trial the judge instructs jurors on the law, and the jury finds the facts and applies the law. Similarly, in a guilty plea trial counsel summarizes the facts,

and the judge determines whether the facts support a conviction of the pending charge. Consequently, when a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense. It is well settled that a defendant can stipulate to a prior conviction, even though the prior conviction itself involved a mixed question of fact and law. While the statutory classification of this prior conviction is a legal determination, its classification is fact driven. Relying on a defendant's past criminal history, the trial court determines the range of sentence.

Here the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts of the murder. By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed. While defendant does not challenge the other stipulations as improper, he contends he could not legally stipulate that his prior second-degree murder conviction constituted a B1 felony.

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C.G.S. § 15A-1340.14(a) (2017). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.* § 15A-1340.14(f) (2017). The State may prove a prior conviction exists by (1) "[s]tipulation of the parties"; (2) "[a]n original or copy of the court record of the prior conviction"; (3) "[a] copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts"; or (4) "[a]ny other method found by the court to be reliable." *Id.* After the trial court determines the total number of prior record points a defendant has accumulated, the court utilizes N.C.G.S. § 15A-1340.14(c) to establish the prior record level based on the total record points the defendant has accrued.

Before 2012 all second-degree murders were classified at the same level for sentencing purposes. *See* Act of June 28, 2012, ch. 165, sec. 1, 2011 N.C. Sess. Laws (Reg. Sess. 2012) 781, 782. In the 2012 amendments, however, the legislature assigned culpability to convicted offenders depending upon the nature of their conduct at the time of the homicide

resulting in their second-degree murder convictions and the intent with which they acted at that time. *See also* ch. 165, pmbl., 2011 N.C. Sess. Laws (Reg. Sess. 2012) at 781. The version of the statute applicable here states:

> (b) . . . Any person who commits second degree murder shall be punished as a Class B1 felon, *except* that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
>
> (2) The murder is one that was proximately caused by the unlawful distribution of [controlled substances], and the ingestion of such substance caused the death of the user.

N.C.G.S. § 14-17(b)(1)-(2) (2015) (emphasis and brackets added).

While the second-degree murder classifications changed, second-degree murder remained a single offense with the same elements and definition. Second-degree murder is defined as "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (citations omitted). Malice may be shown in at least three different ways: (1) actual malice, meaning "hatred, ill-will or spite"; (2) an inherently dangerous act "done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) " 'that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1963)).

Given the consistent definition of second-degree murder and the 2012 amendments to N.C.G.S. § 14-17, the text of the statute indicates the legislature's intent to elevate second-degree murder to a B1 offense, except in the two limited factual scenarios when the second-degree murder stems from either an inherently dangerous act or omission or a drug

overdose. *See id.* § 14-17(b) ("Any person who commits second degree murder shall be punished as a Class B1 felon, *except* that a person who commits second degree murder shall be punished as a Class B2 felon . . . ." (emphasis added)); *see also State v. Lail*, ___ N.C. App. ___, ___, 795 S.E.2d 401, 408 (2016) ("The plain language of [N.C.G.S. § 14-17] . . . indicates clearly that the legislature intended to increase the sentence for second-degree murder to Class B1 and to retain Class B2 punishment only where either statutorily defined situation exists."), *disc. rev. denied*, 369 N.C. 524, 796 S.E.2d 927 (2017). Thus, the legislature distinguishes between second-degree murders that involve an intent to harm (actual malice or the intent to take a life without justification) versus the less culpable ones that involve recklessness (an inherently dangerous act or omission) or a drug overdose. Generally, a second-degree murder conviction is a B1 offense, *see* N.C.G.S. § 14-17(b), which receives nine sentencing points, *see id.* § 15A-1340.14(b)(1a) (2017). The exception arises when it is shown that the facts of the murder meet one of the statutory exceptions, thereby making the murder a B2 offense, which receives six points for sentencing purposes. *See id.* § 15A-1340.14(b)(2) (2017).

It is undisputed that the State may prove a prior offense through stipulation of the parties. *See id.* § 15A-1340.14(f). This proof by stipulation necessarily includes the factual basis and legal application to the facts underlying the conviction. Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense. Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification.

Here defendant could properly stipulate to the facts surrounding his offense by either recounting the facts at the hearing or by stipulating to a general second-degree murder conviction that has a B1 classification. Either method of stipulating would allow the trial judge to determine the proper classification of the offense, calculate the total number of points assigned to defendant's prior convictions, and designate defendant's appropriate offender level. By stipulating to the worksheet, defendant simply agreed that the facts underlying his second-degree murder conviction, of which he was well aware, fell within the general B1 category because the offense did not involve either of the two factual exceptions recognized for the B2 classification. *See id.* § 14-17; *see also*

N.C.P.I. – Crim. 206.30A (June 2014) (instructing the jury to determine, as a question of fact, whether malice exists, including the types of malice that dictate whether conduct is a B1 offense). Defendant's factual stipulation then allowed the trial judge to properly classify the offense as B1.

The pertinent facts underlying defendant's second-degree murder conviction are helpful in understanding why he would stipulate that his conviction fell within the standard second-degree murder category. This Court in *State v. Pickens*, 335 N.C. 717, 440 S.E.2d 552 (1994), thoroughly recounted the facts leading to defendant's plea to second-degree murder.[1] In 1991 a jury originally convicted defendant of first-degree murder based on the felony murder rule. The murder arose from a lengthy, heated, and volatile situation. Defendant assaulted his then-girlfriend, Robinson, who called the police and subsequently obtained an arrest warrant. *Id.* at 718-19, 440 S.E.2d at 553. Thereafter, defendant returned to Robinson's apartment and again assaulted her. *Id.* at 719, 440 S.E.2d at 553. At that point, a fight broke out between defendant and Cannady, a man helping move defendant's items out of the apartment, and both men were injured. *Id.* at 719, 440 S.E.2d at 553. Robinson, Cannady, and several others fled to a relative's apartment in the same complex. *Id.* at 719, 440 S.E.2d at 553. The State presented evidence that defendant and his half-brother, Pickens, were both armed and pursued the others. Once the others were inside the second apartment, Robinson looked out a window and saw defendant. Thereafter, two shots came through the window, one of which struck and killed Robinson's young daughter. *Id.* at 719, 440 S.E.2d at 553.

Defendant and Pickens were jointly tried for the murder. *Id.* at 718, 440 S.E.2d at 552-53. Neither defendant nor Pickens contended that the incident resulted from a random shooting, but they instead accused each other of firing the fatal shot. *Id.* at 724, 440 S.E.2d at 556. After defendant was convicted of first-degree murder, this Court granted him a new trial upon concluding that the charges against him were erroneously joined with charges against the other defendant. *See id.* at 728-29, 440 S.E.2d at 559. On remand, defendant pled guilty to second-degree murder based on the same facts. These relevant facts, of which defendant was intimately aware, indicate that his conduct fell within the usual

1. The complete name of this case is *State of North Carolina v. Charles L. Pickens, Jr., and James Edward Arrington*. Pickens and defendant were jointly tried for the murder, and they are half-brothers.

B1 second-degree murder classification and do not support either of the limited factual exceptions recognized in the B2 classification.[2]

Moreover, taking into account the customarily fast pace of a plea sentencing hearing, a common sense reading of the exchange between the parties at trial shows that defendant's stipulation was to the nature of his conduct, which met the requirements of the B1 classification for second-degree murder not covered by the B2 exceptions. Stipulations of prior convictions, including the facts underlying a prior offense and the identity of the prior offense itself, are routine; for instance, defendant here stipulated to numerous other prior convictions and does not contend that those stipulations are improper. Nothing suggests the trial court did not accept defendant's stipulation here to likewise be a standard one that was, as a matter of course, linked to the facts surrounding his second-degree murder conviction.

Because defendant, the person most familiar with the facts surrounding his offense, stipulated to the factual basis for his 1994 second-degree murder conviction, this Court need not require a trial court to pursue further inquiry or make defendant recount the facts during the hearing. *See Sanders v. Ellington*, 77 N.C. 255, 256 (1877) ("When the parties to an action agree upon a matter of fact, they are bound by it, and it is not the duty of the judge to interfere, for he is presumed to be ignorant of the facts. When the parties agree upon a matter of law, they are not bound by it, and it is the duty of the judge to interfere and correct the mistake, if there be one, as to the law, for he is presumed to know the law . . . ."). It is presumed that defense counsel knew the law and advised defendant about the listed offenses when reviewing the plea agreement before defendant accepted the agreement. *See Turner v. Powell*, 93 N.C. 341, 343 (1885) ("It is presumed that [counsel] knew the law and advised his client correctly . . . ."). Further, it is evident that the trial court was satisfied to exercise its authority to accept the parties' stipulation regarding prior offenses as a part of the court's acceptance of the plea arrangement. If the trial court had concern about the nature of the second-degree murder stipulation in light of the date of conviction, the court would have inquired further.

Our analysis here is consistent with that of the Court of Appeals in *State v. Wingate*, 213 N.C. App. 419, 713 S.E.2d 188 (2011), in which that

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2. Whether Robinson's daughter was the intended target is irrelevant because the malice with which defendant acted "follows the bullet." *See State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (quoting 40 Am. Jur. 2d *Homicide* § 11, at 303 (1968)).

court upheld a stipulation to a particular classification of a crime arising under a statute having two possible classifications. The defendant in *Wingate* stipulated to a sentencing worksheet stating he had previously been convicted of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine, all of which were designated on the worksheet as Class G felonies. *Id.* at 420, 713 S.E.2d at 189. Though prohibited under the same criminal statute, selling cocaine constitutes a Class G felony and delivering cocaine constitutes a Class H felony. On appeal the defendant argued that his stipulation to the Class G classification constituted an improper stipulation of law. *Id.* at 420, 713 S.E.2d at 189-90. The Court of Appeals rejected the defendant's argument, holding that "the class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate." *Id.* at 420, 713 S.E.2d at 190. In doing so, the Court of Appeals recognized that the defendant stipulated to a question of fact: that he was convicted of the offense under a theory of *selling* cocaine. *Id.* at 421, 713 S.E.2d at 190. Just as the classifications in *Wingate* involved a question of fact to which the defendant could properly stipulate, defendant here could properly stipulate that the facts underlying his second-degree murder conviction justified its classification as a B1 offense.

In sum, defendant's stipulation here is properly understood to be a stipulation to the facts of his prior offense and that those facts supported its B1 classification. The trial court duly accepted the stipulation. Therefore, the decision of the Court of Appeals vacating the trial court's judgment and setting aside defendant's plea agreement is reversed, and the Court of Appeals is instructed to reinstate the judgment of the trial court.

REVERSED.

Justice ERVIN dissenting.

As a result of its determination that "[d]efendant properly stipulated to the facts of his prior offense and that those facts supported its B1 classification," the Court has decided that the trial court properly classified defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony for purposes of calculating defendant's prior record level based upon the parties' stipulation. In view of my belief that the classification of defendant's prior second-degree murder conviction as a Class B1 felony required the making of a legal determination and that the record presented for our review in this case lacks any support for the trial court's determination to classify defendant's prior

second-degree murder conviction as a Class B1 felony other than the parties' stipulation, I believe that the Court of Appeals correctly held that the trial court erred in the course of calculating defendant's prior record level. As a result, I respectfully dissent from the Court's decision in this case.

As the record clearly reflects, defendant entered a plea of guilty to second-degree murder on 1 July 1994. At the time that defendant was convicted of second-degree murder, all second-degree murders were classified in the same manner for sentencing purposes. In 2012, the General Assembly modified the manner in which the offense of second-degree murder was classified for sentencing purposes, with a judge sentencing a defendant who has been convicted of second-degree murder being required to decide whether the defendant should be sentenced as a Class B1 felon or a Class B2 felon, with that determination hinging upon the type of malice with which the defendant acted at the time that he committed the murder and whether the murder proximately resulted from the distribution of certain controlled substances.

On 14 September 2015, defendant entered a guilty plea to a number of new offenses committed in 2013, resulting in the entry of the judgment that is at issue in this case. At the time that defendant was sentenced for these new convictions, the trial court had to determine defendant's prior record level which, in turn, required the trial court to determine how many prior record points should be assigned to defendant's 1994 second-degree murder conviction. In order to make that determination, the trial court was required to decide whether defendant's second-degree murder conviction should be classified as a Class B1 or a Class B2 felony, with that decision necessarily resting upon a determination of the type of malice with which defendant acted at the time that he committed the second-degree murder for which he was convicted in 1994 given the absence of any indication in the record that defendant's second-degree murder conviction in any way resulted from the distribution of opium, cocaine, or methamphetamine.[1] As I read the record,

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1. According to well-established North Carolina law, "there are at least three kinds of malice," including "a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice"; "when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; and "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (first citing *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922), *disapproved in part on other grounds by State v. Phillips*, 264 N.C. 508, 516, 142 S.E.2d 337, 342 (1965); then

the only basis upon which the trial court could have made this determination was the parties' stipulation that defendant's prior second-degree murder conviction should be assigned nine, rather than six, prior record points for purposes of calculating defendant's prior record level.

As a general proposition, "stipulations as to matters of law are not binding upon courts." *State v. McLaughlin*, 341 N.C. 426, 441, 462 S.E.2d 1, 8 (1995) (citations omitted), *cert. denied*, 516 U.S. 1133, 116 S. Ct. 956, 133 L. Ed. 2d 879 (1996); *see also State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985) (stating that the trial court erred by accepting the parties' stipulation that a child was not competent to testify as a witness given the trial court's failure to make an independent competency evaluation based upon a personal evaluation of the child); *State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) (stating that this Court was not bound by the State's stipulation that investigating officers lacked probable cause to suspect that contraband would be found in the glove compartment in a defendant's motor vehicle given "[t]he general rule" that "stipulations as to the law are of no validity" (first citing *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56-57, 213 S.E.2d 563, 569 (1975); then citing *In re Edmundson*, 273 N.C. 92, 97, 159 S.E.2d 509, 513 (1968); then citing *U Drive It Auto Co. v. Atl. Fire Ins. Co.*, 239 N.C. 416, 419, 80 S.E.2d 35, 38 (1954); then citing *Moore v. State*, 200 N.C. 300, 301, 156 S.E. 806, 807 (1931); and then citing *Sanders v. Ellington*, 77 N.C. 255, 256 (1877) (stating that, "[w]hen the parties agree upon a matter of law, they are not bound by it, and it is the duty of the judge to interfere and correct the mistake, if there be one, as to the law, for he is presumed to know the law, and it is his province to declare it"))).

For better or worse, the difference between a matter of fact and a matter of law is not always clear. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (stating that "[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult"). On the one hand, "[f]acts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation" and, "in turn, provide the bases for conclusions." *State ex rel. Utils. Comm'n v. Pub. Staff*, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988) (citing *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987)). On the other hand, "any determination requiring the exercise of judgment or the application of

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citing *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978); and then quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1963) (quoting *Benson*, 183 N.C. at 799, 111 S.E. at 871)).

legal principles is more properly classified a conclusion of law." *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (quoting *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (first citing *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985); then citing *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982))). As a result, a valid stipulation must concern "things in space and time that can be objectively ascertained by one or more of the five senses," *Utils. Comm'n v. Pub. Staff*, 322 N.C. at 693, 370 S.E.2d at 570, rather than a "determination requiring the exercise of judgment or the application of legal principles," *Sparks*, 362 N.C. at 185, 657 S.E.2d at 658 (quoting *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675).

A determination of the type of malice with which defendant acted at the time that he committed the killing that led to his 1994 conviction for second-degree murder required the sentencing judge to ascertain both what the defendant did and the legal effect of the defendant's actions. Although the first of these two determinations, which requires an examination of what happened in space and time, is a factual one, the second will, in at least some circumstances, require the sentencing judge to make a legal determination as to what the available factual evidence suggests that the theory of guilt that led to the defendant's conviction would have been. In view of the fact that there has been no prior determination of the theory of malice upon which defendant's second-degree murder conviction rested in this case, the trial court's decision concerning the manner in which defendant's second-degree murder conviction should be classified for the purpose of calculating his prior record level in this case necessarily requires both a factual and a legal determination, with the former being something to which the parties could properly stipulate and the latter being something to which they could not properly stipulate.

As the Court notes, the parties to a criminal action may stipulate to the fact that the defendant had previously been convicted of a criminal offense. N.C.G.S. § 15A-1340.14(f)(1)(2017). Although "conviction" is not statutorily defined in or for purposes of N.C.G.S. 15A-1340.14, that term is ordinarily understood as "the ascertainment of the defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury." *Smith v. Thomas*, 149 N.C. 100, 101, 62 S.E. 772, 773 (1908) (citations omitted); *see also Conviction*, *Black's Law Dictionary* (10th ed. 2014) (defining "conviction" as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty" or "[t]he judgment (as by a jury verdict) that a person is guilty of a crime"). Thus, the "conviction" to which a defendant is

entitled to stipulate in accordance with N.C.G.S. § 15A-1340.14(f)(1) is the fact that he or she had been judicially determined to have committed a specific offense rather than the body of factual information underlying that conviction. Although a determination that a defendant has been judicially determined to have committed a specific offense is, in almost all instances, sufficient to permit a subsequent sentencing judge to determine precisely how many prior record points should be assigned to that defendant based upon that prior conviction, the 2012 amendments to N.C.G.S. § 14-17(b) providing for the classification of certain second-degree murders as Class B1 felonies and other second-degree murders as Class B2 felonies preclude a trial judge from determining how many prior record points should be assigned to a defendant based solely upon the fact that he or she had a prior second-degree murder conviction given that such convictions result in the assignment of different numbers of prior record points depending upon whether the conduct that resulted in the defendant's conviction was encompassed within N.C.G.S. § 14-17(b)(1) or N.C.G.S. § 14-17(b)(2). Although defendant could have properly stipulated to the facts necessary to make the required determination concerning the extent to which his prior second-degree murder conviction was for a Class B1 or a Class B2 felony, the record does not reflect that he ever did so. Instead, the parties simply stipulated to the legal conclusion that defendant's conduct should be treated as coming within the confines of N.C.G.S. § 14-17(b)(1) rather than N.C.G.S. § 14-17(b)(2). For that reason, I am unable to avoid the conclusion that the trial court's decision to classify defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony rested solely upon an acceptance of the parties' legal determination that various facts never presented for the trial court's consideration by stipulation or otherwise sufficed to establish that defendant's conduct was described in N.C.G.S. § 14-17(b)(1), rather than N.C.G.S. § 14-17(b)(2), instead of resting upon an independent analysis of the applicable facts in light of the relevant legal principles. As a result, I am also unable to avoid the conclusion that the trial court's decision to assign nine, rather than six, prior record points to defendant's conviction rested upon an unlawful stipulation to a matter of law.[2]

2. Although the Court treats a second-degree murder conviction as presumptively being a Class B1 felony, the fact that the State has the burden of proving that a particular prior conviction exists, N.C.G.S. § 15A-1340.14(f)(2017) (providing that "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists"), compels the conclusion that any failure on the part of the State to establish that a defendant's second-degree murder conviction should be treated as a Class B1 felony requires that the relevant second-degree murder conviction be treated as a Class B2 felony for the purpose of calculating the defendant's prior record level.

In reaching a contrary conclusion, the Court asserts that defendant's stipulation that his second-degree murder conviction should be classified as a Class B1, rather than a Class B2, felony is "like a stipulation to any other conviction" and notes that defendant "does not challenge the other five stipulations [to prior convictions] as improper." Although the parties to a criminal action are clearly authorized to stipulate to the fact that the defendant has previously been convicted of a particular criminal offense, N.C.G.S. § 15A-1340.14(f)(1), and while the parties to this case did properly stipulate to the existence of all the other convictions reflected upon the prior record worksheet submitted for the trial court's consideration, the classification of defendant's other convictions did not necessitate a legal determination like the one required to determine whether defendant's second-degree murder conviction should be classified as a Class B1 or a Class B2 felony. As a result, the fact that the parties to this case were entitled to stipulate to defendant's other convictions sheds little light on their ability to stipulate to the manner in which defendant's second-degree murder should be treated for prior record level calculation purposes given that, in the aftermath of the 2012 amendments to N.C.G.S. § 14-17(b), the mere fact that the defendant has been convicted of second-degree murder, standing alone, does not answer the question of how many prior record points should be attributed to that conviction. Simply put, the parties' stipulation that defendant's second-degree murder conviction should be treated as a Class B1, rather than a Class B2, felony is simply not like other stipulations to the effect that a defendant has been convicted of a particular offense and should not be treated as such.

In reversing the Court of Appeals' decision, the Court essentially concludes that the trial court was entitled to accept the parties' stipulation to the number of prior record points that should be assigned to defendant's second-degree murder conviction on the theory that a defendant who stipulates to having been convicted of a particular offense also stipulates to the facts underlying that conviction. In other words, the Court evidently believes that a defendant who stipulates to the manner in which his or her prior second-degree murder conviction should be classified for prior record level calculation purposes effectively stipulates to the existence of facts sufficient to support a determination that his or her conviction should be classified as either a Class B1 or a Class B2 felony, making it a "factual stipulation" that "allowed the trial judge to properly classify the offense as B1." Aside from the fact that the Court has not cited any authority in support of this expansive definition of a "conviction" as that term in used in N.C.G.S. § 15A-1340.14 or explained why this approach is consistent with the manner in which that term

has been utilized in this Court's precedent, it is difficult for me to see what sort of stipulation would not qualify as a stipulation of fact under the Court's logic or how the Court's decision can be squared with this Court's holdings in cases like *Fearing*, 315 N.C. at 174, 337 S.E.2d at 55 (prohibiting a trial judge from accepting the parties' stipulation that a particular child was competent to testify as a witness); *Phifer*, 297 N.C. at 226, 254 S.E.2d at 591 (stating that the trial court was not bound by the State's stipulation that investigating officers lacked probable cause to believe that contraband was located in a particular automobile); *Quick*, 287 N.C. at 56-57, 213 S.E.2d at 569 (stating that the trial court was not bound by any stipulation that defendant was a "slayer" for purposes of N.C.G.S. § 31A-3(3)); and *In re Edmundson*, 273 N.C. at 97, 159 S.E.2d at 513 (rejecting the parties' stipulation to the effect "[t]hat the agreed statement of facts stipulated herein are all of the facts necessary for the court to make its decision"). As a result, the logic upon which the Court's decision to reverse the Court of Appeals' decision in this case rests does not strike me as persuasive.

I am equally unpersuaded by the Court's reliance upon the decision of the Court of Appeals in *State v. Wingate*, 213 N.C. App. 419, 713 S.E.2d 188 (2011), which upheld the parties' stipulation that defendant had been convicted for selling, as compared to delivering, cocaine. *See* N.C.G.S. § 90-95(b)(1) (2009) (providing that "any person who violates G.S. 90-95(a)(1) with respect to . . . [a] controlled substance . . . shall be punished as a Class H felon, except . . . the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G felony"); *see also State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) (observing that "the *sale* of narcotics and the *delivery* of narcotics are separate offenses" (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976)).[3] Aside from the fact that it is not binding upon this Court, *Wingate* did nothing more than reiterate the longstanding principle that a defendant

3. Admittedly, this Court did state in *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990), that, "by the statutory language at issue here the legislature has made it *one criminal offense* to 'sell or deliver' a controlled substance under N.C.G.S. § 90-95(a)(1)." On the other hand, after acknowledging the language from *State v. Creason* quoted in the text of this opinion, we stated that *Creason*, 313 N.C. at 129, 326 S.E.2d at 28, and *State v. Dietz*, 289 N.C. 488, 498, 223 S.E.2d 357, 364 (1976) (stating that "the two acts could have been *charged* as separate offenses" (emphasis added)), did "not mandate the conclusion that a defendant may also be *convicted* for two offenses in such situations." *Moore*, 327 N.C. at 382, 395 S.E.2d at 127 (emphasis omitted). As a result, our cases addressing this issue, when harmonized with each other, indicate that, while the sale and delivery of a controlled substance are separate offenses, a defendant cannot be separately convicted of and sentenced for the sale and delivery of the same controlled substance consistent with the relevant legislative intent.

can stipulate that he or she had been convicted of a particular offense at some point in the past. Thus, *Wingate* has no bearing upon the proper resolution of this case, which revolves around a determination of the identity of the theory under which defendant was convicted of second-degree murder rather than the identity of the crime that defendant was previously convicted of having committed.

In addition to concluding that the stipulation upon which the trial court based its prior record level determination was factual rather than legal in nature, the Court conducts an independent factual analysis based upon the information contained in this Court's decision overturning defendant's original first-degree murder conviction in order to determine that defendant's second-degree murder conviction should be classified as a Class B1, rather than a Class B2, felony for purposes of calculating defendant's prior record level and that defendant had ample justification for believing that his second-degree murder conviction reflected his guilt of a Class B1, rather than a Class B2, felony. According to the Court, "defendant pled guilty to second-degree murder based on the same facts" and "[t]hese relevant facts, of which defendant was intimately aware, indicate that defendant's conduct fell within the [B1] second-degree murder classification." Aside from my concern that this portion of the Court's analysis could be construed as appellate fact-finding, the record contains no indication that the information upon which the Court relies in making this determination was ever presented to the trial court, which acts as the fact-finder in structured sentencing proceedings.[4] As a result, I do not believe that the Court's independent evaluation of material that does not appear in the record that has been presented for our review in this case provides any basis for upholding the trial court's decision to treat defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony for the purpose of calculating defendant's prior record level.

Thus, the trial court's decision to classify defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony necessarily rested upon an acceptance of the parties' legal determination that various facts never presented for the trial court's consideration

4. Admittedly, the prosecutor did state in the course of her sentencing argument that defendant had "killed a nine-year-old child, shot a nine-year-old child to death" and that defendant had entered a plea of "guilty to second-degree murder" after this Court reversed his first-degree murder conviction. However, the statement in question does not constitute evidence and defendant never took any action that can be construed as a stipulation to the accuracy of that statement.

by stipulation or otherwise sufficed to establish that defendant's conduct was encompassed in N.C.G.S. § 14-17(b)(1), rather than N.C.G.S. § 14-17(b)(2), instead of upon an independent analysis of the factual information presented for the court's consideration at defendant's sentencing hearing in light of the applicable legal principles. For that reason, the trial court's determination that defendant's second-degree murder conviction should be assigned nine, rather than six, points for the purpose of calculating defendant's prior record level rests solely upon an acceptance of the parties' stipulation to a matter of law, an action which this Court has repeatedly held that trial judges lack the authority to take. As a result, I respectfully dissent from my colleagues' decision to reverse the Court of Appeals' decision and would, instead, affirm the Court of Appeals' decision to vacate defendant's guilty plea and remand this case for further proceedings in the trial court.

Justices HUDSON and BEASLEY join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JUSTIN DEANDRE BASS

No. 208A17

Filed 26 October 2018

1. Criminal Law—instructions—self-defense—stand your ground

The trial court erred by omitting the relevant stand-your-ground language from the jury instructions delivered at a trial in which defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court concluded that the "no duty to retreat" instruction did not apply because defendant was not in his home or place of residence, workplace, or car. An individual who is lawfully located may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another. A defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the stand-your-ground provision.

2. Evidence—victim's character—violent conduct—specific instances

The trial court did not err in an assault prosecution by excluding specific instances of the victim's violent conduct offered to prove that he was the first aggressor on the night he was shot. Character is not an essential element of self-defense; to show that he acted in self-defense, a defendant must show that his victim was the aggressor but need not prove that the victim was a violent or aggressive person. N.C. Rule of Evidence 405 limits the use of specific instances of past misconduct to cases in which character is an essential element of the charge, claim, or defense.

3. Criminal Law—continuance—development of inadmissible evidence

The trial court properly denied a motion for a continuance where the motion was for the purpose of further developing evidence that would have been inadmissible at trial.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), awarding defendant a new trial after appeal from a judgment entered on 19 December 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 28 August 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Lisa Miles for defendant-appellee.

BEASLEY, Justice.

In this case we consider whether the Court of Appeals erred in holding that the trial court committed prejudicial error by (1) omitting the relevant stand-your-ground language from jury instructions on self-defense, (2) excluding evidence at trial of specific incidents of the victim's violent past conduct, and (3) denying defendant's motion to continue. For the reasons stated below, we hold that the Court of Appeals erred with regard to the second and third issues. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals and remand this case for further proceedings.

On 4 July 2014, defendant Justin Deandre Bass and Jerome Fogg, the victim, engaged in a verbal altercation, which escalated to the point

that defendant shot Fogg, severely injuring him. The night of the shooting was not defendant's first run in with Fogg. Defendant and Fogg first met just two weeks before, on 23 June 2014, when Fogg instigated a fight with defendant. Defendant's and Fogg's accounts of the night they first met and the night defendant shot Fogg differ substantially.

23 June 2014 – Fogg Beats Defendant

On 23 June 2014, defendant encountered Fogg on the grounds of the Bay Tree Apartments in Raleigh, where defendant lived. According to Fogg, defendant began making disrespectful comments about Fogg. After ignoring the comments for some time, Fogg confronted defendant, who then said that he was, like Fogg, a member of the Piru Blood gang. When Fogg attempted to initiate the Piru handshake with defendant, defendant was unable to perform the correct gestures. Fogg asked defendant additional questions to determine if he was truly a Piru member, and when he was satisfied that defendant's claim was true, taught defendant the handshake. The men went their separate ways for a short time, but according to Fogg, defendant continued to speak about him in a disrespectful manner. When Fogg again confronted defendant, defendant pulled his pants up and raised his hands—gestures that implied to Fogg that defendant wanted to fight. Fogg obliged by throwing the first punch.

Defendant also testified at trial about the night he first met Fogg. According to defendant, he was celebrating his birthday by drinking vodka in the parking lot of the Bay Tree Apartments when Fogg approached him and demanded that he perform the Piru handshake, which he was unable to do. Fogg left and returned a short time later, again demanding that defendant perform the handshake. When defendant could not, Fogg immediately punched him in the nose. Defendant testified that he never made disrespectful comments or gestures toward Fogg and that he never hit Fogg back. Fogg beat defendant severely, breaking his jaw in three places and landing one blow powerful enough to cause defendant to "fly through the air and roll." Defendant required surgery for his injuries, and his jaw was wired shut for approximately seven weeks, during which he could not speak and was restricted to a liquid diet. After the beating, defendant began carrying a handgun to protect himself from Fogg.

4 July 2014 – Defendant Shoots Fogg

On 4 July 2014, two weeks after he was beaten by Fogg, and while his mouth was still wired shut from the incident, defendant was watching fireworks with friends at the Bay Tree Apartments. Defendant testified

that at some point after the fireworks ended, he saw Fogg arrive at the apartment complex. Defendant walked to a different part of the complex, hoping to avoid Fogg. Nonetheless, Fogg approached defendant aggressively, accused him of "talking junk," and taunted him, saying, "I hope you enjoy drinking the Ensure for six weeks." As Fogg approached defendant, defendant saw a large knife on his hip. According to defendant, Fogg told defendant that he "had five minutes to get away from him. And if [defendant] didn't get away from him within five minutes[,] he was going to beat [defendant] up." Defendant attempted to move away, walking from the breezeway where he was standing to a grassy area nearby, but Fogg told him instead to "get on the concrete." Defendant pulled his gun from his pocket and pointed it at Fogg, hoping that he would leave. Fogg asked if defendant intended to shoot him and started reaching for his knife and moving toward defendant. Defendant cocked the gun and began shooting as Fogg advanced. Defendant stopped shooting and ran when he saw Fogg grab his chest and start stumbling. Defendant fled to Virginia for approximately two weeks before returning to North Carolina, where he was arrested.

According to Fogg's testimony, he was at the Bay Tree Apartments visiting friends on 4 July 2014 when defendant approached him and threatened to "pop [Fogg's] mother****ing ass." Fogg testified that he never removed his knife from its holster on his hip. Defendant pulled out the gun and immediately shot Fogg three times. As a result of the shooting, Fogg underwent multiple surgeries and spent a month in the hospital, two weeks of which he was in a coma.

On 9 September 2014, defendant was indicted in Wake County for attempted first-degree murder of Jerome Fogg. A superseding indictment dated 18 November 2014 added a second count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant pleaded not guilty and gave notice that he intended to pursue a defense of self-defense.

The case was heard during the 10 December 2014 criminal session of Superior Court, Wake County, before Judge Paul C. Ridgeway.[1] At the conclusion of the trial, the jury found defendant not guilty of attempted first-degree murder but convicted him of assault with a deadly weapon

1. Defendant had a co-defendant, Bruce Douglas, who was charged with being an accessory after the fact to attempted first-degree murder because he allegedly assisted defendant in attempting to escape from the scene after the shooting. Douglas was acquitted.

inflicting serious injury. That same day, the trial court sentenced defendant, a Level III offender, to a presumptive-range term of thirty to forty-eight months.

Defendant appealed his conviction, and a divided panel of the Court of Appeals found reversible error and granted defendant a new trial based on its decision with respect to three issues: the trial court's denial of defendant's request for certain jury instructions related to the doctrine of self defense; its exclusion of evidence of specific acts of violence committed by Fogg against individuals other than defendant; and its denial of defendant's motion to continue based on defense counsel's request to investigate new evidence disclosed by the State on the eve of trial. *See State v. Bass*, ___ N.C. App. ___, 802 S.E.2d 477 (2017). The State now appeals the Court of Appeals' decision with respect to each issue on the basis of Judge Bryant's dissent below.

I.

On 24 October 2014, defendant gave notice of his intent to pursue the defense of self-defense, and throughout the trial, presented evidence tending to support his self defense claim. At the charge conference following the close of evidence, defense counsel requested that the jury charge include language from Pattern Jury Instruction 308.45 providing, in relevant part, that "the [d]efendant has no duty to retreat in a place where the [d]efendant has a lawful right to be. [And] [t]he Defendant would have a lawful right to be in his place of residence." N.C.P.I.–Crim. 308.45 (June 2012) (footnotes, brackets, and parentheses omitted). Believing that the "no duty to retreat" provisions apply only to an individual located in his own home, workplace, or motor vehicle, the trial court concluded the proposed instruction was inapplicable to defendant and declined to deliver it.

After deliberations began, the jury asked for clarification on a defendant's duty to retreat. Outside the presence of the jury, defense counsel again requested that the trial court deliver a "no duty to retreat" instruction, this time pointing to Pattern Jury Instruction 308.10, providing that

> If the defendant was not the aggressor and the defendant was [in the defendant's own home] [on the defendant's own premises] [in the defendant's place of residence] [at the defendant's workplace] [in the defendant's motor vehicle] [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant.

> However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I.–Crim. 308.10 (June 2012) (brackets in original) (footnote omitted). Specifically, defense counsel asked the trial court to deliver the instruction utilizing the bracketed phrase "at a place the defendant had a lawful right to be." Again, the trial court concluded that, because defendant was not in his home or place of residence, workplace, or car, the "no duty to retreat" instruction did not apply. After hearing from counsel, the trial court instructed the jury that "by North Carolina statute, a person has no duty to retreat in one's home, one's own premises, one's place of residence, one's workplace, or one's motor vehicle. This law does not apply in this case."

With regard to this issue, the Court of Appeals held that, based on the plain language of the relevant statutes, the trial court committed reversible error in omitting the "no duty to retreat" language from its instructions. *Bass*, ___ N.C. App. at ___, 802 S.E.2d at 484. The dissent agreed with the majority's statutory construction but felt constrained by a prior Court of Appeals decision to the contrary. *Id.* at ___, 802 S.E.2d at 487 (Bryant, J., dissenting) (citing *State v. Lee*, ___ N.C. App. ___, ___, 789 S.E.2d 679, 686 (2016), *rev'd*, 370 N.C. 671, 811 S.E.2d 563 (2018)). The State argues that the Court of Appeals erred in granting defendant a new trial based on the trial court's omission of no duty to retreat jury instructions.

[1] Two sections of the General Statutes set out circumstances in which an individual will be excused from criminal liability for using deadly force in self defense. First, under N.C.G.S. § 14-51.3,

> [a] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to [N.C.]G.S. 14 51.2.

N.C.G.S. § 14-51.3(a) (2017). Second, under N.C.G.S. § 14-51.2,

> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or

herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

. . . .

(f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.

Id. § 14-51.2(b), (f). Both sections provide that individuals using force as described are immune from civil or criminal liability[2] and that such individuals have no duty to retreat before using defensive force. *Id.* §§ 14-51.2(f), -51.3(a). Thus, wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another.

After the Court of Appeals issued its opinion in the instant case, this Court reversed that court's decision in *Lee*. *See State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018), rev'g ___ N.C. App. at ___, 789 S.E.2d at 686. Thus, neither the trial court below nor the dissenting judge had

2. N.C.G.S. §§ 14-51.2(e), -51.3(b) ("A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.").

the benefit of this Court's decision in *Lee* when considering the instant case. In *Lee*, the trial court agreed to deliver the pattern jury instruction on first-degree murder and self-defense, N.C.P.I.–Crim. 206.10, which provides, in relevant part, that "the defendant has no duty to retreat in a place where the defendant has a lawful right to be" and incorporates by reference the pattern instruction on "Self-Defense, Retreat," which states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." *Lee*, 370 N.C. at 673, 811 S.E.2d at 565 (first quoting N.C.P.I.–Crim. 206.10 (June 2014), then quoting N.C.P.I.–Crim. 308.10 (June 2012) (second set of brackets in original)). When the trial court charged the jury, however, it omitted the "no duty to retreat" language from its instructions. *Id.* at 673, 811 S.E.2d at 565. This Court concluded that the omission amounted to an "inaccurate and misleading statement of the law," warranting a new trial. *Id.* at 671, 811 S.E.2d at 564.

Based on our opinion in *Lee*, it is clear that a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.

The State here does not appear to argue otherwise. Instead, contrary to its implicit concession before the trial court, the State argues that defendant was not entitled to a self defense instruction at all. *See St.'s Br.* at 27 ("Section 14-51.4 states unequivocally that the justification described in Section 14-51.3 is not available to one who was committing a felony."). Whether defendant was precluded from the protection of the self-defense statutes was not an issue raised by the dissent in the Court of Appeals, nor was it the subject of a petition seeking discretionary review of additional issues. With regard to the jury instructions at issue here, the only question properly before this Court is whether, assuming defendant was entitled to a self-defense instruction, the trial court erred in omitting the relevant stand-your-ground language. It did. Defendant is entitled to a trial with complete and accurate jury instructions.

II.

[2] In its next argument, the State argues that the Court of Appeals erred in holding that the trial court should have admitted evidence of specific instances of Fogg's violent conduct for the purpose of proving he was the first aggressor on the night he was shot. We agree.

In his case-in-chief, defendant sought to introduce testimony describing specific instances of violent conduct by Fogg. Specifically,

defendant sought to introduce testimony from Candia Williford, Michael Bauman, and Terry Harris about times when they had experienced or witnessed Fogg's violent behavior. The trial court excluded all evidence of specific instances of Fogg's violent conduct, finding them inadmissible at trial under Rule 405(b) of the North Carolina Rules of Evidence. Rather, each witness was allowed to testify only to his or her opinion of Fogg's character for violence and Fogg's reputation in the community.

Evidence of an individual's character is generally inadmissible to prove he "acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). A criminal defendant may, however, introduce evidence of a victim's pertinent character traits. *Id.*, Rule 404(a)(2).

Whether character evidence is admissible under Rule 404(a)(2) is merely a threshold inquiry, separate from the determination of the *method* by which character may be proved, which is governed by Rule 405. Under Rule 405, character may be demonstrated by evidence of specific instances of conduct only in cases "in which character or a trait of character of a person is an essential element of a charge, claim, or defense." *Id.*, Rule 405(b). Otherwise, character may be proved only "by testimony as to reputation or by testimony in the form of an opinion." *Id.*, Rule 405(a).

To determine whether evidence of specific instances of conduct is admissible, a court must ask whether the character trait is an "essential element." Because this Court has not defined the term "essential element" for purposes of Rule 405(b), we look to secondary sources and decisions of federal courts as instructive.[3] To determine whether character is "an essential element of a charge, claim, or defense," *id.*, Rule 405(b), "courts must ascertain whether a character trait is an 'operative fact'—one that under the substantive law determines rights and liabilities of the parties." 1 Kenneth S. Broun, *McCormick on Evidence* § 187, at 1019 20 (7th ed. 2013). This determination requires the court to ask whether "proof, or failure of proof, of the character trait by itself [would] actually satisfy an element of the charge, claim, or defense." *Id.* at 1020. If it would not, "then character is not essential and evidence should be limited to opinion or reputation." *Id.*

In a case in which the defendant relies on the defense of entrapment, for example, his predisposition to commit the crime of which he is

3. *See* N.C.G.S. § 8C-1, Rule 405 commentary ("This [r]ule is identical to Fed. R. Evid. 405 except for the addition of the last sentence to subdivision (a).").

accused has been held to be an essential element. *See, e.g.*, *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002) (per curiam) ("The character of the defendant is one of the elements—indeed, it is an essential element—to be considered in determining predisposition."); *accord United States v. Brannan*, 562 F.3d 1300, 1308 (11th Cir. 2009); *United States v. Franco*, 484 F.3d 347, 352 (6th Cir. 2007); *see also* N.C.G.S. § 8C-1, Rule 404 commentary (noting that "[c]haracter may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as 'character in issue,' " such as in an action for negligent entrustment of a motor vehicle, in which the driver's competency is at issue. (quoting Fed. R. Evid. 404(a) advisory comm. n.)).

Although under Rule 404(a)(2), evidence of a violent character is admissible to prove circumstantially that the victim was the aggressor, Rule 405(b) limits the method by which that fact may be proved. To prove he acted in self-defense, a defendant must show that his victim was the aggressor; he need not prove that the victim was a violent or aggressive person. *See State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572 (1981) (listing the elements of self-defense, which include that the "defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation" (citations omitted)); *see also* N.C.G.S. §§ 14-51.2, 51.3. To say that a person is the aggressor on a specific occasion is not to say that he has a violent character: a generally peaceful person may experience a moment of violence, and a normally aggressive or violent person might refrain from violence on a specific occasion. Because a defendant may prove self-defense without demonstrating his victim's character, character is not an essential element of self-defense. Accordingly, with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts.

This Court's opinion in *State v. Watson* does not hold otherwise. 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994), *disavowed in part on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724, *cert. denied*, 514 U.S. 1071 (1995). In *Watson*, the defendant sought to elicit testimony regarding a witness's opinion of the victim's character for violence. *Id.* at 186-87, 449 S.E.2d at 705-06. We held that, "[b]ecause the jury was instructed on self-defense and was required to determine who was the aggressor in the affray, it was error for the trial court not to permit the jury to hear evidence regarding the victim's violent character." *Id.* at 188, 449 S.E.2d at 706. Because *Watson* dealt only with opinion evidence—not evidence of specific acts—it sheds little light on the issue presented here.

Here, the excluded evidence consisted of specific incidents of violence committed by Fogg. Williford, Fogg's ex-girlfriend, would have testified that Fogg had, without provocation and in front of Williford's three-year-old daughter, pulled a gun on Williford and choked her until she passed out. She also would have testified that Fogg beat her so badly that her eyes were swollen shut and she was left with a bruise reflecting an imprint of Fogg's shoe on her back. Michael Bauman would have testified that, on one occasion, he witnessed Fogg punch his own dog in the face because it approached another individual for attention. On another occasion, Bauman encountered Fogg at a restaurant, where Fogg initiated a fight with Bauman and also "grabbed" and "threw" Bauman's mother-in-law when she attempted to defuse the situation. Terry Harris would have testified that Fogg, a complete stranger to him, initiated a verbal altercation with him in a convenience store. Two or three weeks later, Fogg pulled over when he saw Harris walking on the side of the road and hit him until Harris was knocked unconscious. According to Harris, Fogg "[s]plit the side of [his] face" such that he required stitches.

Because Rule 405 limits the use of specific instances of past conduct to cases in which character is an essential element of the charge, claim, or defense, the trial court correctly excluded testimony regarding these specific prior acts of violence by Fogg.[4]

---

4. Our holding today is not only dictated by the plain language of Rule 405, but is also consistent with federal circuit court decisions, which are instructive on the issue. *See*, *e.g.*, *United States v. Bordeaux*, 570 F.3d 1041, 1050-51 (8th Cir. 2009) (holding that, because a victim's violent character is not an essential element of self-defense, the victim's character could not be demonstrated by evidence of specific violent acts so that such evidence was not admissible under Rule 405(b)); *United States v. Jackson*, 549 F.3d 963, 975-76 (5th Cir. 2008) (holding that a victim's prison records showing specific instances of violence were inadmissible under Rule 405(b) to prove he was the first aggressor), *cert. denied*, 558 U.S. 828 (2009); *United States v. Bautista*, 145 F.3d 1140, 1152 (10th Cir.) (holding that evidence of a victim's aggressive character to prove he was the aggressor must consist of reputation or opinion evidence only), *cert. denied*, 525 U.S. 911 (1998); *Palmquist v. Selvik*, 111 F.3d 1332, 1341 (7th Cir. 1997) (holding that, because evidence showing an individual had a "death wish" and desired to commit "suicide by police" was character evidence that did not speak to an essential element of a law enforcement officer's self-defense claim, the evidence could be presented only in the form of reputation or opinion); *United States v. Keiser*, 57 F.3d 847, 857 (9th Cir.) (holding that evidence of specific instances of violence by the victim that tended to demonstrate his violent character were inadmissible to prove that he was the aggressor in an affray), *cert. denied*, 516 U.S. 1029 (1995); *Virgin Islands v. Carino*, 631 F.2d 226, 229 (3d Cir. 1980) (holding that the trial court properly excluded evidence of a victim's prior conviction of manslaughter to demonstrate that the victim was likely the aggressor in a physical altercation with the defendant).

III.

[3] Finally, the State argues that the trial court did not err in denying defendant's motion to continue. We agree.

On the eve of trial, the State received information related to five incidents of assaultive behavior by Fogg, each of which was previously unknown to either the prosecutor or defense counsel. The State immediately relayed the information to defense counsel, who moved for a continuance to further investigate the information. The trial court denied the motion and proceeded to trial.

Because defendant's motion to continue was for the purpose of further developing evidence that would have been inadmissible at trial, the trial court properly denied that motion.

Conclusion

We hold that the trial court committed reversible error in omitting the relevant stand your ground language from the jury instructions delivered at trial; accordingly, we affirm that part of the Court of Appeals' decision holding that defendant is entitled to a new trial on that basis. and remand this case for further proceedings not inconsistent with this opinion. Because we conclude that the trial court did not err in excluding specific instances of Fogg's violent conduct or in denying defendant's motion to continue, we reverse the decision below with regard to those issues. This case is remanded to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED; NEW TRIAL.

STATE v. FREDERICK

[371 N.C. 547 (2018)]

STATE OF NORTH CAROLINA
v.
KURT DEION FREDERICK

No. 146A18

Filed 26 October 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 855 (2018), affirming an order entered on 7 June 2016 by Judge W. Osmond Smith, III in Superior Court, Wake County. Heard in the Supreme Court on 1 October 2018.

Joshua H. Stein, Attorney General, by J. Aldean Webster III, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, and Amanda S. Hitchcock, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
DARYL LAMONT JONES

No. 336A17

Filed 26 October 2018

Indictment and Information—citation for misdemeanor—sufficient to invoke trial court's subject matter jurisdiction

Defendant's citation for operating a motor vehicle when having an open container of alcohol in the passenger compartment while alcohol remained in his system was sufficient to charge him with the misdemeanor offense and to invoke the trial court's subject matter jurisdiction. The citation included sufficient criminal pleading contents (which are designed to be more relaxed than those of other criminal charging instruments), and defendant chose not to invoke his right through an appropriate motion to have the State charge him in a new pleading while the matter was still pending in its court of original jurisdiction.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 701 (2017), finding no error in a judgment entered on 15 June 2016 by Judge George B. Collins, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2018.

Joshua H. Stein, Attorney General, by Robert C. Montgomery, Senior Deputy Attorney General, and Daniel P. O'Brien, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

MORGAN, Justice.

Defendant Daryl Lamont Jones was convicted of operating a motor vehicle when having an open container of alcohol in the passenger compartment while alcohol remained in his system. Defendant appealed his conviction to the Court of Appeals which, in a divided opinion, found that the citation that charged the offense was legally sufficient to properly invoke the trial court's subject-matter jurisdiction. *State v. Jones*, ___ N.C. App. ___, ___, 805 S.E.2d 701, 706 (2017). The dissenting judge

did not believe that the citation met the statutory requirements for a valid criminal pleading in this State. *Id.* at ___, 805 S.E.2d at 712. Upon review, we conclude that the citation sufficiently and properly vested the trial court with subject-matter jurisdiction in this criminal proceeding and we thus affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

On 4 January 2015, while driving his vehicle in Wake County, defendant was cited for speeding and charged with operating a motor vehicle when having an open container of alcohol while alcohol remained in his system. Defendant was not charged with driving while impaired. The fill-in-the-blanks citation form utilized by the charging officer stated that the officer

> has probable cause to believe that on . . . Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully
>
> OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE (G.S. 20-141(J1))
>
> and on . . . Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]

(Underlined language added by the officer to supply the pertinent information regarding the charged offenses in the blanks provided on the citation).

Defendant filed a motion to dismiss the open container charge on grounds that the citation was fatally defective such that the trial court lacked jurisdiction. The district court denied the motion and found defendant guilty as charged of both offenses. Defendant appealed his convictions to the Superior Court, Wake County. On 15 June 2016, a jury found defendant guilty of operating a vehicle while having an open container but found him not guilty of speeding. Defendant was sentenced on the same day to a twenty-day term of incarceration, which was suspended subject to six months of unsupervised probation. Defendant appealed his conviction to the Court of Appeals.

In the Court of Appeals, defendant argued that the trial court lacked jurisdiction to try him for operating a motor vehicle while having an open container because the citation purporting to charge him with that

offense failed to allege all of its essential elements. *Id.* at ___, 805 S.E.2d at 705. In a divided opinion filed on 5 September 2017, the Court of Appeals found no error. The majority of the court explained that N.C.G.S. § 15A-302(c) establishes requirements for citations like the one issued here. The majority further noted that the official commentary to Article 49, "Pleadings and Joinder," which is part of the Criminal Procedure Act embodied in Chapter 15A, states that a citation, which "constitutes the 'pleading' for misdemeanor criminal cases, ... 'requires only that the crime be "identified." ' " *Id.* at ___, 805 S.E.2d at 703. The commentary further states that a defendant has the right under N.C.G.S. § 15A-922(c) to object to the description of the crime in a citation and "require a more formal pleading." *Id.* at ___, 805 S.E.2d at 704 (emphasis omitted) (quoting N.C.G.S. ch. 15A, art. 49 official cmt. (2015)). Therefore, the majority concluded that "[t]o the extent there was a deficiency in the citation, [d]efendant had the right to object to trial on the citation by filing a motion" requiring that he "be charged in a new pleading," with any such objection being filed in the district court division. *Id.* at ___, 805 S.E.2d at 704 (quoting N.C.G.S. § 15A-922(c) (2015)).

The Court of Appeals majority determined that the citation complied with N.C.G.S. § 15A-302(c) because the charging instrument "properly identified the crime of having an open container of alcohol in the car while alcohol remained in his system, charged by citing N.C.[G.S.] § 20-138.7(a) and stating [d]efendant had an open container of alcohol after drinking." *Id.* at ___, 805 S.E.2d at 705. The majority reiterated that

> [b]ecause [d]efendant failed to file a motion pursuant to [N.C.G.S. §] 15A-922(c) [to object to the citation at the district court level], he was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in [N.C.G.S. §] 20-138.7(g).

Id. at ___, 805 S.E.2d at 705.

The court's majority went on to add that even assuming, *arguendo*, that defendant was not required to object to the contents of the citation, "the failure to comply with N.C.[G.S.] § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect." *Id.* at ___, 805 S.E.2d at 705. Unlike the requirements for an indictment, the State constitution does not require "a citation charging a misdemeanor to allege each element as a prerequisite of the district court's jurisdiction." *Id.* at ___, 805 S.E.2d at 705. As a result, "any failure of a law enforcement officer to include each element of the

crime in a citation is not fatal to the district court's jurisdiction." *Id.* at ___, 805 S.E.2d at 706. Furthermore, the majority found that "the record establishes that [d]efendant was apprised of the charge against him and would not be subject to double jeopardy." *Id.* at ___, 805 S.E.2d at 706.

The dissenting judge reasoned that the citation was defective due to its failure to allege facts that "would support the elements of the offense" with which defendant was charged. *Id.* at ___, 805 S.E.2d at 712 (Zachary, J., dissenting). She disagreed with the majority's determination that defendant's failure to object to the citation in the court of original jurisdiction—here, the district court—precluded his challenge to jurisdiction. *Id.* at ___, 805 S.E.2d at 707. The dissent noted that N.C.G.S. § 15A-1446(d) allows a defendant to assert errors on appellate review based upon the failure of a pleading "to state essential elements of an alleged violation as required by [N.C.]G.S. § 15A-924(a)(5)," even if no objection was made in the trial division because a challenge to subject-matter jurisdiction can be raised at any time. *Id.* at ___, 805 S.E.2d at 707. The dissent noted that the majority opinion relied primarily on the language of N.C.G.S. § 15A-302, which describes the information that a valid citation must contain; however, the dissent distinguished between a citation used as a process, which serves as a directive that a person appear in court and answer a misdemeanor or infraction charge or charges, and a citation used as a criminal pleading, which must assert facts supporting every element of a criminal offense and the defendant's commission thereof. *Id.* at ___, ___, 805 S.E.2d at 706, 708. The dissent concluded that the majority "fails to acknowledge this issue or to articulate a basis for applying the requirements for use of a citation as a form of process, rather than the specific statutory criteria for use of a citation as a criminal pleading." *Id.* at ___, 805 S.E.2d at 710.

For those reasons, the dissenting judge stated that she would hold that, "upon application of the plain language of the statutes governing criminal pleadings in North Carolina, the citation is invalid." *Id.* at ___, 805 S.E.2d at 707. The dissenting opinion included the following passage:

> In sum, N.C.[G.S.] § 15A-921 expressly states that a citation may serve as the State's pleading in a criminal case, and N.C.[G.S.] § 15A-924(a)(5) requires that <u>every</u> criminal pleading must contain facts supporting each of the elements of the criminal offense with which the defendant is charged. There do not appear to be *any* appellate cases holding that N.C.[G.S.] § 15A-924 does not apply to a citation used as the pleading in a criminal case. Under the plain language of these statutes, when a citation is used

> by the State as the pleading in a criminal case, it must—like any other criminal pleading—allege facts that support the elements of the offense with which the defendant is charged.

Id. at ___, 805 S.E.2d at 709. The dissent opined that the citation "fail[ed] to allege that defendant operated a motor vehicle on a public road or highway, or even that he drove," or "that the open container of alcohol was in the passenger area of defendant's car." *Id.* at ___, 805 S.E.2d at 709. Accordingly, the dissent concluded that "[t]he citation fails to allege facts that would support two of the three elements of the offense: that defendant drove on a public highway, or that he had an open container of alcohol in the passenger area of the car." *Id.* at ___, 805 S.E.2d at 709. The dissent concluded that, "[a]s a result, the citation did not comply with the requirements of N.C.[G.S.] § 15A-924 [governing contents of pleadings] and did not confer subject matter jurisdiction upon the trial court." *Id.* at ___, 805 S.E.2d at 709.

II. Analysis

North Carolina General Statutes section 15A-921 states: "[T]he following may serve as pleadings of the State in criminal cases:

> (1) Citation.
> (2) Criminal summons.
> (3) Warrant for arrest.
> (4) Magistrate's order . . . after arrest without warrant.
> (5) Statement of charges.
> (6) Information.
> (7) Indictment."

N.C.G.S. § 15A-921 (2017). Defendant was issued a citation for a misdemeanor offense and ordered to appear in the District Court, Wake County. "Exclusive original jurisdiction of all misdemeanors is in the district courts of North Carolina." *State v. Felmet*, 302 N.C. 173, 174, 273 S.E.2d 708, 710 (1981) (citing N.C.G.S. § 7A-272)).

The criminal pleading that initiated proceedings against defendant in the present case is a citation. "A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." N.C.G.S. § 15A-302(a) (2017). A law enforcement officer is authorized to "issue a citation to any person who he has probable cause

to believe has committed a misdemeanor or infraction." *Id.* § 15A-302(b) (2017). Statutory mandates require that a citation:

> (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
>
> (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
>
> (3) Identify the officer issuing the citation, and
>
> (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

Id. § 15A-302(c) (2017).

While N.C.G.S. § 15A-302 clearly establishes that a citation is sufficient to be utilized as a criminal pleading as authorized by N.C.G.S. § 15A-921(1), nevertheless, it is appropriate and instructive to reconcile the efficacy and properness of its usage in light of N.C.G.S. § 15A-924(a)(5). N.C.G.S. § 15A-924(a)(5) states that a criminal pleading must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

Id. § 15A-924(a)(5) (2017).

At first blush, it appears that the statutory provisions of N.C.G.S. § 15A-302 and N.C.G.S. § 15A-921(1), when read together, are in conflict with the terms contained in N.C.G.S. § 15A-924(a)(5). N.C.G.S. §§ 15A-302 and 15A-921(1) jointly establish that a citation sufficiently operates as a criminal pleading when it merely complies with the requirement, *inter alia*, to "[i]dentify the crime charged"; N.C.G.S. § 15A-924(a)(5), on the other hand, mandates a fuller recitation in a criminal pleading of

"[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense." This seeming inconsistency between and among the statutory enactments at issue in the present case is readily resolved by the Official Commentary to Article 49 of the North Carolina General Statutes.

While N.C.G.S. § 15A-924 sets forth specific requirements for criminal pleadings, the opening Official Commentary to Article 49, "Pleadings and Joinder"— within which N.C.G.S. § 15A-924 is found—expressly discusses citations used as pleadings. *See id.* ch. 15A, art. 49 official cmt. (2017). "[T]he commentary to a statutory provision can be helpful in some cases in discerning legislative intent." *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993) (citations omitted). The commentary to Article 49 delineates the evolution and application of different types of pleadings which are employable for the prosecution of criminal cases in North Carolina, while particularly noting the requirements that make each one legally sufficient. N.C.G.S. ch. 15A, art. 49 official cmt. In comparing and contrasting the required components of these various criminal pleadings, the Official Commentary details the salient considerations which are endemic to the first four criminal pleading forms which were recognized in this State before the introduction of the citation form: "warrants and criminal summonses in misdemeanor cases and informations and indictments in felony cases." *Id.* Concepts such as sufficiency of the pleading, the statement of the crime, a showing of probable cause, an order for arrest, an order to appear, an order of commitment or bail, and provisions for supplemental information are all identified and compared for each of the original four types of criminal pleadings in North Carolina. *Id.* On the other hand, in contrast to these other types of criminal pleadings, the Official Commentary instructs that a citation simply needs to identify the crime that is being charged:

> It should be noted that the citation (G.S. 15A-302) requires only that the crime be "identified," less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. *It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the [Criminal Code] Commission simply gives the defendant the right to object and require a more formal pleading.* G.S. 15A-922(c).

Id. (emphasis added).

Here, the fill-in-the-blanks citation form showed that the charging officer

> has probable cause to believe that on or about Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully
>
> OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE (G.S. 20-141(J1))
>
> and on . . . Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]

A studious focus on the applicable statutes, official commentaries to those statutes, and relevant case law demonstrates that the citation in the case at bar is a criminal pleading that is sufficient to authorize the trial court to exercise jurisdiction over the charged criminal misdemeanor offense, while giving appropriate notice to defendant of the offense for which he is being compelled to appear in court. The citation at issue fulfills the salient requirements of N.C.G.S. § 15A-302, and therefore this charging instrument is in compliance with the statute in that it was a directive issued by a law enforcement officer for defendant to appear in court to answer the misdemeanor charge of driving a motor vehicle on a highway while there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container and while the driver is consuming alcohol or while alcohol remains in the driver's body, thereby satisfying N.C.G.S. § 15A-302(a); the citation was issued to defendant by the charging officer based upon the officer's determination that probable cause existed to believe that the misdemeanor offense had been committed by defendant, thereby satisfying N.C.G.S. § 15A-302(b); and the citation identified the crime charged, contained the name and address of defendant, identified the charging officer, and directed defendant to appear in the District Court, Wake County in Courtroom 101 on Thursday, February 19, 2015 between the hours of 7:45 a.m. and 3:30 p.m., thereby satisfying N.C.G.S. § 15A-302(c).[1]

It is at this juncture in the analysis that the learned dissent in the appellate court below begins to veer from the proper course, because

1. Because the speeding charge which was also alleged in the citation is not relevant to this analysis, any discussion of it is purposely omitted.

the dissent focuses upon the *manner* in which the statement of the charged crime is conveyed in the entirety of the citation instead of the *substance* of the statement of the charged crime in the whole citation. Although the dissent is discomforted by the fragmented language that was utilized by the charging officer in composing the details of the misdemeanor charge, nonetheless, the contents of the citation at issue as drafted by the officer comport with the substantive requirements delineated in N.C.G.S. § 15A-302(c) and suit the practical considerations afforded by the Official Commentary to Article 49, "Pleadings and Joinder," of the North Carolina General Statutes.

If defendant had concerns about the level of detail contained in the citation, N.C.G.S. § 15A-922(c) expressly provides that "[a] defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." *Id.* § 15A-922(c) (2017). This opportunity is afforded to a defendant in recognition of the fact that N.C.G.S. § 15A-302 "provides for a separate criminal process, applicable to any misdemeanor." N.C.G.S. § 15A-302 (2017). Additionally, in light of this classification of a citation as a "separate criminal process" that is required only to identify the crime at issue instead of providing a more exhaustive "statement of the crime" as required in the other criminal pleadings, a defendant such as the current one is given the right to object and require a more formal pleading under N.C.G.S. § 15A-922(c). *See id.* ch. 15A, art. 49 official cmt. The dissent in the appellate court below misidentifies this statutory right of a defendant to require a criminal pleading more formal than a citation while the charge is still pending in the court of original jurisdiction by conflating it with a defendant's challenge to a trial court's jurisdiction over a criminal matter that can be raised even on appeal. While a defendant is entitled to require the State to file a statement of charges if he objects to being tried by citation alone, after defendant here did not object to trial by citation in the court of original jurisdiction, he was no longer entitled to assert that right. *See State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982) (citing *Felmet*, 302 N.C. 173, 273 S.E.2d 708); *see also State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002). In the case at bar, because defendant did not invoke his right through an appropriate motion filed in District Court, Wake County to have the State charge him in a new pleading while the matter was still pending in its court of original jurisdiction, defendant was precluded from challenging the citation in another tribunal on those grounds because he was no longer in a position to assert his statutory right to object to trial on citation after jurisdiction had been established and his case had been determined in district court.

Lastly, it is significant that a citation's pleading contents are deemed to be "reasonabl[y] differen[t]" from the more stringent requirements for other criminal processes because the citation "will be prepared by an officer on the scene." N.C.G.S. ch. 15A, art. 49 official cmt. This approved relaxation of the established criminal pleading contents for a citation is rooted in the realization that the execution of a law enforcement officer's investigative duties and responsibilities must embrace certain practicalities and realities. Among them is the unsettling, unpredictable, and unsecure environment in which officers routinely issue citations as they patrol and monitor the areas that they serve. An officer on his or her beat cannot reasonably be expected to utilize the same measured standards of thoroughness and exactness in syntax and grammar that a grand jury applies in its quietude in composing an indictment or a prosecutor employs in drafting an information. Based upon these and related considerations, the criminal pleading contents of a citation are designed and allowed to be more relaxed than those of other criminal charging instruments.

A citation that identifies the charged offense in compliance with N.C.G.S. § 15A-302(c) sufficiently satisfies the legal requirements applicable to the contents of this category of criminal pleadings and establishes the exercise of the trial court's jurisdiction. Under the facts and circumstances of the present case, the citation at issue included sufficient criminal pleading contents in order to properly charge defendant with the misdemeanor offense for which he was found guilty, and the trial court had subject-matter jurisdiction to enter judgment in this criminal proceeding. Accordingly, we affirm the decision of the Court of Appeals finding no error in the trial court's judgment.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JOHN ANDREW MADDUX

No. 278PA17

Filed 26 October 2018

1. Appeal and Error—plain error—standard

The holding in *State v. Lawrence*, 365 N.C. 506 (2012), reaffirmed the legal principle that plain error does not exist where a defendant cannot show that the jury probably would have returned a different verdict absent the error. *Lawrence* did not hold that plain error is shown *unless* the evidence against defendant is overwhelming and uncontroverted.

2. Criminal Law—instructions—aiding and abetting—individual guilt

To the extent that the Court of Appeals applied the correct standard for plain error review to a prosecution arising from the discovery of materials used for manufacturing methamphetamine in and around defendant's house, it incorrectly concluded that an erroneous aiding and abetting instruction did not amount to plain error. Given the evidence of defendant's individual guilt (including viewing the items found in context and not in isolation), the erroneous aiding and abetting instruction did not have a probable impact on the jury's finding.

3. Appeal and Error—plain error—alternate theories of conviction

The rule that reversible error occurs when it is not clear which alternate theory the jury used to convict defendant does not apply to plain error cases.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 463 (2017), finding plain error in judgments entered on 20 April 2016 by Judge C. Winston Gilchrist in Superior Court, Johnston County, and granting defendant a new trial. Heard in the Supreme Court on 29 August 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Anne Bleyman for defendant-appellee.

HUDSON, Justice.

This case comes to us by way of the State's petition for discretionary review of the opinion of the Court of Appeals. Specifically, the State has asked us to determine whether the Court of Appeals erred in awarding defendant a new trial because of plain error in a jury instruction on aiding and abetting. We agree that the trial court erred in giving the aiding and abetting instruction; however, because the Court of Appeals incorrectly concluded that the trial court's error amounted to plain error, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

This case began with two searches of defendant's residence by the Johnston County Sheriff's Office Narcotics Division on 19 August 2015. On that date, two detectives responded to a complaint that drug activity was occurring at defendant's home. When they arrived at the house, defendant answered the door, identified himself as the owner of the property, and consented to a search of his residence.

During the first search, the two detectives walked through the interior of the home. Defendant first took the detectives to his master bedroom and adjoining master bathroom, where they found no evidence of drug activity. Then defendant took the detectives to the bedroom of one of his sons, where they found on the floor a clear baggie containing four white pills and a homemade bong. Upon finding these things, detectives asked defendant whether any methamphetamine manufacturing items or paraphernalia were in the home. Defendant responded in the negative but added that his stepson Lyn Sawyer (Sawyer), who occasionally spent the night on defendant's couch, was on probation for manufacturing methamphetamine in South Carolina.[1]

Next, the detectives' search took them to the outside of defendant's residence, where they found a one-pot meth lab[2] inside a burn barrel.[3]

1. Detectives would later find mail addressed to Sawyer in defendant's residence.

2. The one-pot meth lab is one of a number of methods that methamphetamine producers use to cook meth. The process involves placing the ingredients, including ammonium nitrate, into a plastic bottle and shaking the bottle to produce an ammonia gas reaction. As the ammonia gas is produced, the person cooking the meth alternatively shakes the bottle and partially opens the cap to release the pressure building inside the bottle. The result of this process is that the pseudoephedrine inside the bottle will convert into methamphetamine. After the pseudoephedrine converts into methamphetamine, a separate process is used to change the methamphetamine into a powdery substance. That powdery substance is then filtered through strainers and coffee filters.

3. A burn barrel houses a burn pile, which is a commonly used method by methamphetamine producers to destroy the evidence of methamphetamine production.

The one-pot meth lab and burn barrel were located approximately thirty yards behind defendant's home, and they were accessible to neighboring properties. Upon finding the burn barrel, the two detectives turned the investigation over to another detective, who carried out his own search of defendant's residence and conducted a more general investigation.

The other detective's search of defendant's residence revealed the following items that are commonly used in methamphetamine production: (1) in defendant's master bedroom, an empty package of lithium batteries, a metal strainer, a glass measuring cup, the top portion of a plastic bottle containing a white residue,[4] a Walgreens receipt for pseudoephedrine,[5] and a plastic tube located inside a plastic tote bag sitting by defendant's bed; (2) in defendant's master bathroom, an open box of instant cold packs,[6] a clear plastic baggie containing a white powdered substance that appeared to be methamphetamine,[7] and a trash bag containing balled-up, burnt strips of aluminum foil that were consistent with meth boats used to smoke methamphetamine; and (3) in defendant's kitchen, a can of acetone[8] that was either nearly or completely empty, a water bladder from an instant cold pack,[9] and more meth boats inside a diaper box.

When the other detective searched the burn barrel in defendant's back yard, he found two two-liter plastic bottles that the North Carolina State Crime Laboratory would later determine contained methamphetamine and pseudoephedrine, along with coffee filters, a latex glove, trash bags, paper towels, and battery casings that apparently had been pried open.[10]

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4. This residue was not chemically analyzed.

5. Pseudoephedrine is an immediate precursor chemical to the manufacture of methamphetamine under N.C.G.S. § 90-95(d2)(37)(2017).

6. The specific brand of instant cold packs found in defendant's bathroom contains ammonium nitrate, which is an essential element in manufacturing methamphetamine.

7. This powdered substance was not chemically analyzed.

8. Acetone is an immediate precursor chemical to the manufacture of methamphetamine under N.C.G.S. § 90-95(d2)(2)(2017).

9. In the process of cooking methamphetamine, producers separate the water bladder from the ammonium nitrate contained in the cold pack and discard the water bladder.

10. Methamphetamine producers pry open casings for AA lithium batteries to access the lithium strips that are used in methamphetamine production. It is unclear whether the battery casing recovered from the burn barrel belonged to a AA lithium battery.

After searching the burn barrel, the detective continued to walk around the exterior premises of defendant's residence, during which he was approached by defendant's neighbor. After briefly speaking with the neighbor, the detective decided to search the neighbor's residence also. Before searching the house, the detective learned that the neighbor shared her house with her daughter, Alex Tucker (Tucker), and Sawyer, defendant's stepson. After receiving consent from Tucker to search her room, the detective found a pink bag containing materials that he identified as methamphetamine components.

Also, while the detective was at the neighbor's residence, a child informed him that Sawyer had run out of the back door when the detective approached the residence. Although Sawyer would not return to the neighbor's residence, the detective spoke with him over the telephone. Sawyer said he was scared to return because he was on probation, and he was afraid the detective would arrest him for manufacturing meth.

Next, the detective spoke with defendant, who stated that: (1) "Sawyer was a liar"; (2) Sawyer possibly cooked meth with Tucker next door; (3) Sawyer talked about cooking meth all the time; and (4) defendant had once tried meth but did not like it.

On 5 October 2015, defendant was indicted for manufacturing methamphetamine, possession of a methamphetamine precursor, and felony conspiracy to manufacture methamphetamine. On 2 November 2015, defendant was further indicted for two counts of trafficking in methamphetamine by manufacture and one count of conspiring to traffic in methamphetamine. Later, on 7 March 2016, the second indictment was replaced by a superseding indictment charging trafficking in methamphetamine by manufacture, trafficking in methamphetamine by possession, and conspiracy to traffic in methamphetamine.

Defendant's trial began on 18 April 2016, and the State presented the above evidence through the testimonies of (1) the detectives who conducted the 19 August 2015 searches and interviews, (2) an agent with the State Bureau of Investigation who entered defendant's home and processed the items related to the one-pot meth lab and those found in the burn barrel located on defendant's property, and (3) a drug chemist at the North Carolina State Crime Laboratory who analyzed the contents of plastic bottles contained in the one-pot meth lab and burn-barrel.

At the close of the State's evidence, defendant moved to dismiss all charges. The State voluntarily dismissed the two conspiracy charges, and the trial court granted defendant's motion to dismiss as to the charge of possession of an immediate precursor; however, the court denied the

motion as to the rest of the charges. Defendant offered no evidence at trial.

At the close of all evidence, the trial court instructed the jury that defendant could be found guilty of manufacturing methamphetamine, trafficking in methamphetamine by manufacture, and trafficking in methamphetamine by possession either through a theory of individual guilt or of aiding and abetting. Defendant did not object to these instructions.

The jury convicted defendant of the following charges by means of a general verdict sheet: (1) manufacturing methamphetamine, (2) trafficking in methamphetamine by manufacture, and (3) trafficking in methamphetamine by possession. Because there was no special verdict sheet, the record does not reflect whether the jury convicted defendant based on individual guilt or a theory of aiding and abetting. Defendant appealed his convictions to the Court of Appeals.

The Court of Appeals announced two holdings pertinent to this appeal. First, the Court of Appeals determined that the trial court erred in giving an aiding and abetting instruction because "[t]he evidence does not reveal Defendant expressly communicated his intent to aid or encourage either Tucker or Sawyer." *State v. Maddux*, ___ N.C. App.___, 803 S.E.2d 463, 2017 WL 3259784, at *6 (2017) (unpublished). The Court of Appeals added:

> Further, there is no evidence to warrant the inference of aid from the relationship or friendship they shared. Defendant is Sawyer's stepfather. However, Sawyer did not live with Defendant. The only evidence linking Sawyer to Defendant's home is Defendant's admission he allowed Sawyer to "occasionally crash[ ] on his couch in the living room ... every once in a while," and one piece of mail addressed to Sawyer at Defendant's address. The evidence does not disclose a friendship or close relationship between the men. On the contrary, the evidence tends to show a contentious relationship. Defendant told Detectives Sawyer "was a liar and that you cannot trust anything that he said." Furthermore, the only evidence linking Defendant to Tucker is their mutual connection to Sawyer, living next door to one another, and Tucker's statement to Detective Creech about the bag found in her room.
>
> This evidence is not enough to show Defendant aided and abetted another. Accordingly, we hold the court erred by instructing the jury on the State's theory of aiding and abetting.

Maddux, 2017 WL 3259784, at *6 (alterations in original) (footnote and citations omitted).

Second, the Court of Appeals held that the instruction constituted plain error entitling defendant to a new trial. *Id.* at *7. The Court of Appeals correctly noted that because defendant did not object to the instruction at trial, the court must review the instruction for plain error. *Id.* at *5. Then the Court of Appeals set out the test for plain error as follows:

> Plain error occurs when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done [.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. [ ])[, *cert. denied*, 459 U.S. 1018 (1982)]). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted)."

Id. (alteration in original).

After reciting the test for plain error as stated above, the Court of Appeals opined that "absent the erroneous jury instruction, the jury probably would have reached a different result" for four reasons: (1) "The evidence linking Defendant to the offenses is entirely circumstantial"; (2) "There is no direct evidence linking Defendant to the manufacturing evidence found in the house"; (3) "The items found in his home, such as the cold packs and pseudoephedrine medication, are common household products"; and (4) "Detectives found the actual manufacturing device and only evidence chemically analyzed and determined to be methamphetamine in the back yard, between Defendant and Tucker's homes." *Id.* at *7. Later in its opinion, however, the Court of Appeals concluded that "[h]ere, unlike in *Lawrence*, the evidence is not 'overwhelming and uncontroverted' showing Defendant's guilt." *Id.* (quoting *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012)). As a result of its conclusion that the trial court committed plain error, the Court of Appeals granted a new trial to Defendant. *Id.*

Following the decision by the Court of Appeals, the State filed a petition for discretionary review, which we allowed on 1 March 2018. In its petition, the State requested that we examine whether the Court of Appeals erred by holding that the trial court committed plain error in giving the aiding and abetting instruction.

This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citation omitted). We agree with the Court of Appeals that the trial court erred in giving the aiding and abetting instruction. The Court of Appeals, however, incorrectly concluded that the error amounted to plain error. For the reasons stated below we conclude that the Court of Appeals erred in determining that plain error occurred.

II. Analysis

[1] The Court of Appeals improperly applied the plain error standard of review to the facts here. Specifically, the Court of Appeals erred in two ways by (1) incorrectly applying the plain error standard we articulated in *State v. Lawrence*, and (2) concluding on this evidence that there was plain error when applying the correct standard.

An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. In *Lawrence*, we reaffirmed our holding in *State v. Odom* that initially incorporated the plain error rule into North Carolina law. *Id.* at 516-18, 723 S.E.2d at 333-34; *see also Odom*, 307 N.C. at 659-62, 300 S.E.2d at 378-79 (adopting the plain error rule used by the federal courts).

In reaffirming *Odom*, we held that to demonstrate that a trial court committed plain error, the defendant must show "that a fundamental error occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). To show fundamental error, a defendant "must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Further, we held that, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." ' " *Id.* at 518, 723 S.E.2d at 334 (alteration in original) (internal citations omitted) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

In *Lawrence*, while we reaffirmed the legal principles applicable to plain error review, we concluded that the defendant failed to meet his burden of demonstrating such error. *Id.* at 519, 723 S.E.2d at 334. Specifically, we held that the trial court's instruction on conspiracy to commit robbery with a dangerous weapon was erroneous; however, we determined that the error was not plain error, because "[i]n light of the

overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335.

Here the Court of Appeals stated the standard for plain error review correctly and in accord with *Lawrence*: "Defendant must demonstrate that 'absent the error, the jury probably would have reached a different result.' " *Maddux*, 2017 WL 3259784, at *7 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)). But, the court later reasoned that "[h]ere, unlike in *Lawrence*, the evidence is not 'overwhelming and uncontroverted' showing Defendant's guilt." *Id.* (quoting *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335).

The Court of Appeals concluded that the lack of "overwhelming and uncontroverted" evidence against defendant, *see id.* (quoting *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335), meant that "the jury probably would have reached a different result" absent the improper aiding and abetting instruction. *Id.* (quoting *Jordan*, 333 N.C. at 440, 426 S.E. 2d at 697). In other words, the court appears to have indicated that the lack of overwhelming and uncontroverted evidence against defendant required the conclusion that a jury probably would have reached a different result. The Court of Appeals erred in this line of reasoning. We did not hold in *Lawrence* that plain error is shown, and a new trial is required, *unless* the evidence against defendant is overwhelming and uncontroverted. Accordingly, the Court of Appeals erred to the extent it so held. *See id.*

[2] The Court of Appeals also erred in applying the correct standard for plain error. It erred because, "after examination of the entire record," we conclude that the ample evidence of defendant's individual guilt made it unlikely that the improper aiding and abetting instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing and quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

Here the evidence supporting defendant's individual guilt included the following: (1) all of the items found throughout defendant's residence that the State's witnesses identified as being commonly used in the production of methamphetamine, including immediate precursor chemicals to the manufacture of methamphetamine, and (2) all of the evidence found inside the one-pot meth lab and burn barrel on defendant's property, including the plastic bottles that tested positive for methamphetamine and pseudoephedrine. After examining the entire record, we conclude that the erroneous aiding and abetting instruction did not have a probable impact on the jury's finding that defendant was

guilty because of the evidence indicating that defendant, individually, used the components found throughout his house to manufacture methamphetamine in the one-pot meth lab on his own property.

The Court of Appeals offered several explanations for its conclusions. First, the Court of Appeals determined that "[t]he evidence linking Defendant to the offenses is entirely circumstantial." *Maddux*, 2017 WL 3259784, at *7. Relatedly, the Court of Appeals stated that "[t]here is no direct evidence linking Defendant to the manufacturing evidence found in the house." *Id.* Even if accurate, these assertions are not dispositive. We have routinely stated, in the sufficiency of the evidence context, that the characterization of evidence as either direct or circumstantial does not resolve whether the evidence is sufficient. *See, e.g.*, *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) ("[T]he test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." (quoting *State v. Malloy*, 309 N.C. 176, 178-79, 305 S.E.2d 718, 720 (1983))); *State v. Haselden*, 357 N.C. 1, 18, 577 S.E.2d 594, 605 ("Circumstantial evidence may be sufficient to support a conviction even when 'the evidence does not rule out every hypothesis of innocence.' " (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))), *cert. denied*, 540 U.S. 98 (2003).

Second, the Court of Appeals reasoned that the items found in defendant's house were simply common household materials. *Maddux*, 2017 WL 3259784, at *7 ("The items found in his home, such as the cold packs and pseudoephedrine medication, are common household products."). But, this explanation is also unavailing because it treats the items in isolation and without regard for where they were located in the residence.

For example, the second search of defendant's master bedroom area revealed a metal strainer, a glass measuring cup, and a trash bag containing balled-up, burnt pieces of aluminum foil that were consistent with meth boats. In isolation, these items could be innocent household items. Had they been found in defendant's kitchen, one could conclude that they had no purpose outside of routine food preparation and waste disposal.

In contrast, here the metal strainer, the glass measuring cup, and the trash bag containing the balled-up, burnt aluminum foil were found in defendant's master bedroom or bathroom, where they would have no obvious or common household purpose. Additionally, the State's witnesses testified that other items used in methamphetamine production were present throughout defendant's residence and that defendant had a one-pot meth lab and a burn barrel on his property. Furthermore,

chemical analysis of a plastic bottle found inside the one-pot meth lab and burn barrel tested positive for methamphetamine and pseudoephedrine. Lastly, a Walgreens receipt for pseudoephedrine was also found in defendant's bedroom. When viewed with the rest of the evidence, the metal strainer, the glass measuring cup, and the trash bag containing the burnt, aluminum foil strips appear to be something other than mere common household items. In context, these items point more toward usage in the manufacture, possession, or trafficking of methamphetamine.

Finally, the Court of Appeals found that "the actual manufacturing device and only evidence chemically analyzed and determined to be methamphetamine [were found] in the back yard, between Defendant['s] and Tucker's homes." *Id.* at *7. As a result, the Court of Appeals suggested that, because others had access to the burn barrel, there is insufficient evidence to establish defendant as the "sole perpetrator." *Id.* This explanation fails, as did the Court of Appeals' common household items characterization, because it views in isolation the fact that the burn barrel was accessible to others.

We acknowledge that the evidence shows the burn barrel could have been accessed by Sawyer or Tucker from Tucker's home. Nonetheless, this finding does not undermine the theory that defendant was the sole perpetrator. Specifically, the Court of Appeals recognized the existence of methamphetamine "manufacturing evidence" in defendant's residence. *Id.* Furthermore, although the one-pot meth lab and burn barrel were accessible from both residences, they were on *defendant's* property. The evidence viewed in context amply supports the conclusion that defendant used the items found in his house to manufacture methamphetamine in a one-pot meth lab on his property.

We conclude, given this evidence of defendant's individual guilt, that the erroneous aiding and abetting instruction given by the trial court here did not have "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).[11]

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11. **[3]** In addition to the conclusions reached by the Court of Appeals, defendant argues that we cannot uphold his conviction even though there is ample evidence of his individual guilt because we have held that reversible error occurs when a jury is presented with alternative theories of guilt when (1) one of the theories is not supported by the evidence, and (2) it is unclear upon which theory the jury convicted defendant. *See State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). This rule, however, is not applicable to plain error cases, such as this one, in which the error complained of is not preserved. As such, we need not address the substance of this argument.

For the reasons stated above, we hold that the trial court's error in giving the aiding and abetting instruction did not amount to plain error. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

TD BANK, N.A.
v.
EAGLES CREST AT SHARP TOP, LLC, JOHN W. HOLDSWORTH, AND JOHN H. SEATS

No. 350PA16

Filed 26 October 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 651 (2016), dismissing defendants' appeal from an order of summary judgment entered on 11 July 2014 and affirming an order denying reconsideration entered on 5 December 2014 by Judge Gary M. Gavenus in Superior Court, Yancey County. Heard in the Supreme Court on 7 November 2017.

Ward and Smith, P.A., by Norman J. Leonard and Lance P. Martin, for plaintiff-appellee.

David R. Payne, P.A., by David R. Payne and Brian W. Sharpe, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

24 OCTOBER 2018

041P17-3	Arthur O. Armstrong v. Wilson County, et al.	1. Plt's *Pro Se* Petition for *Writ of Mandamus* 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wilson County	1. Denied 2. Denied
050P17-2	State v. Robert Wayne Smith	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
072P17-4	State v. LeQuan Fox	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	Denied
089P18	Francisco J. Adame v. Aerotek, Employer, Self-Insured (ESIS, Third Party Administrator)	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA16-1118) 2. Defs' Motion to Withdraw PDR	1. --- 2. Allowed
093A93-5	Jamie Duarte Sierra v. Eric A. Hooks, Secretary, North Carolina Department of Public Safety Division of Prisons, et al., Timothy McKoy, Superintendent, Franklin Correctional Center	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Franklin County	Denied **09/21/2018**
093P18	Latonya A. Taylor, Individually, and as the Administratrix of the Estates of Sylvester Taylor and Angela Taylor; and as Guardian ad Litem of J.T., N.H., and A.H., Minor Children v. Wake County, d/b/a The Division of Social Services	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA12-99) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Strike	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
103P18	Donnie L. Goins and Jackie Knapp v. Time Warner Cable Southeast, LLC and Wake Electric Membership Corporation d/b/a Wake Electric	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-531) 2. Def's (Time Warner Cable Southeast, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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115A18	Intersal, Inc. v. Hamilton, et al.	Plt's Motion for Extension of Time to Respond to Motion to Dismiss	Allowed extension of time up to and including 19 Oct 2018 **10/02/2018**
118P18-2	State v. Maurice L. Stroud	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot
133P15-3	State v. William Earl Askew	1. Def's *Pro Se* Motion for Notice of Appeal (COA18-267) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
139A18	SciGrip, Inc. f/k/a IPS Structural Adhesives Holdings, Inc. and IPS Intermediate Holdings Corp. v. Samuel B. Osae and Scott Bader, Inc.	1. Joint Motion for Leave to File Under Seal 2. Plts' Conditional Petition for *Writ of Certiorari* to Review Decision of Business Court	1. Allowed 2. Allowed
142P18	DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; The Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	1. Defs' Motion for Temporary Stay (COA17-871) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2018** 2. Allowed 3. Allowed
144P14-2	State v. Scott Jay Stough	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Jackson County	Dismissed

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145P18	State v. Aaron Jackson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-939) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
151P15-3	State v. Timothy Neal Prince	Def's *Pro Se* Motion for PDR (COAP18-559)	Dismissed
158P18-2	In re Robert Lee Styles, Jr.	Petitioner's *Pro Se* Motion to Reconsider	Dismissed
185P18	Nationwide Affinity Insurance Company of America v. Le Bei, Administrator of the Estate of Tei Paw, Thla Aye, Administrator of the Estate of Khai Hne, Khai Tlo, Nu Cing, and Tin Aung	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1086) 2. N.C. Farm Bureau Mutual Insurance Company and N.C. Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot
193P18-3	State v. Joshua Bolen	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
208A17	State v. Justin Deandre Bass	1. State's Motion for Temporary Stay (COA16-421) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Notice of Appeal for Mootness	1. Allowed **06/23/2017** 2. Allowed **06/23/2017** 3. — 4. Denied
210P16-2	Dale Patrick Martin v. Mike Slagel, (Supt.)	Def's *Pro Se* Motion for Notice of Appeal (COAP18-632)	Denied **10/04/2018**
211P18	State v. Joseph Edwards Teague, III	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1134)	Denied **Morgan, J., recused**
220P18	State v. Reginald Leon Allen	Def's PDR Under N.C.G.S. § 7A-31 (COA17-973)	Denied
222P18	State v. Byron Domaine Griffin	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-409) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot

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226P13-2	State v. Joseph Ragland	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/05/2018**
226P18	State v. Joey Lee Raborn, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1105)	Denied **Ervin, J., recused**
228P18	Homestead at Mills River Property Owners Association, Inc. v. Boyd L. Hyder, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-606)	Denied
232P18	Rhonda K. Daniels v. Jerry Daniels	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-73)	Denied
233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas*	1. Allowed **10/05/2018** 2. 3. Allowed **10/05/2018** 4.
235P18	State v. Ty Rayshun Davis	Def's *Pro Se* Motion for Judicial Review	Dismissed
236P06-2	Robert Andrew Bartlett, Sr., v. Eric A. Hooks, Secretary, North Carolina Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/27/2018**
237P04-2	State v. James Edward Bell, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-126)	Dismissed
247P18	State v. Christopher Georges Degand	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1026)	Denied
248A18	Sykes, et al. v. Blue Cross and Blue Shield of North Carolina, et al.	Plts' Motion to Amend Record on Appeal	Allowed **10/02/2018**

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250P18	State v. Harvey Lee Grady	1. Def's Notice of Appeal Based Upon a Constitutional Question COA17-731) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem PDR Timely Filed 4. Def's Motion in the Alternative to Deem PDR a Petition for *Writ of Certiorari* 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed 5. Allowed
252P18	State v. Franchot Lane Christmas	Def's *Pro Se* Motion for Notice of Appeal (COAP18-519)	Dismissed
257P18	State v. Sydney Shakur Mercer	1. State's Motion for Temporary Stay (COA17-1279) 2. State's Petition for *Writ of Supersedeas* 3. State's Motion to File Petition for *Writ of Supersedeas* and Application for Temporary Stay with Corrected Certificate of Service 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/21/2018** 2. 3. Allowed **09/28/2018** 4.
258P18	State v. Darren Wayne Blevins	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA16-589)	Denied
262P18	Alessandra L. McKenzie v. Steven M. McKenzie	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-854)	Denied
266P18-2	State v. Charles Antonio Means	Def's *Pro Se* Motion to Dismiss	Dismissed
271A18	State *ex rel.* Utilities Commission v. Attorney General	1. Joint Motion for Leave to File Documents Under Seal 2. Intervenor's Motion to Admit Bridget M. Lee *Pro Hac Vice*	1. Allowed 2. Allowed
274P15-5	State v. Robert K. Stewart	Def's *Pro Se* Motion of Objections	Dismissed
274A18	State v. Duval Lamont Bowman	1. State's Motion for Temporary Stay (COA17-657) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **08/27/2018** 2. Allowed 3. --- 4. Allowed

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278P18	State v. Vondell Tyshang Gregory	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-571)	Denied
279P18	Huran Ali Born Aaron Godett v. State of North Carolina and Craven County	Plt's *Pro Se* Motion for Suit for Punitive Damages and Compensatory Damages	Dismissed
281P18	State v. Jason Robert Vickers	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1216) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
285P18	State v. Otis Redding Howie, Jr.	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Union County	Dismissed **Ervin, J., recused**
287P18	State v. Donald Wayne Black	Def's PDR Under N.C.G.S. § 7A-31 (COA17-963)	Denied
307P18	Common Cause, Dawn Baldwin Gibson, Robert E. Morrison, Cliff Moone, T. Anthony Spearman, Alida Woods, Lamar Gibson, Michael Schacter, Stella Anderson, Mark Ezzell, and Sabra Faires v. Daniel J. Forest, in his Official Capacity as President of the North Carolina Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger in his Official Capacity as President Pro Tempore of the North Carolina Senate	Plts' PDR Under N.C.G.S. § 7A-31 (COA18-870)	Denied

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308P18	State v. Michael Odell Fair	Def's *Pro Se* Motion for Notice of Motion to Intervene an Estoppel and Rebuttal to Quittance Claim	Dismissed
311P18	State v. Shakita Necole Walton	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/21/2018** 2.
312P18	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/21/2018** 2.
313P18	Dunhill Holdings, LLC, Plaintiff/ Counter-Defendant v. Tisha L. Lindberg, Defendant/Counter-Plaintiff and Wes Massey, Craig Herndon, Hardee Merritt, and Derek Boone, Defendants ——— Tisha L. Lindberg, Third-Party Plaintiff v. Greg Lindberg, Third-Party Defendant	1. Plaintiff-Counter Defendant and Third-Party Def's Motion for Temporary Stay (COAP18-613) 2. Plaintiff/Counter-Defendant and Third-Party Def's Petition for *Writ of Supersedeas* 3. Defendant/Counter-Plaintiff and Third-Party Plaintiff's Motion for Expedited Consideration	1. Allowed **09/24/2018** 2. 3. **Jackson, J., recused**
314P18	State v. Denzil Dequon Fennell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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315P18	Roy A. Cooper, III, Individually and in his Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in his Official Capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives; Charlton L. Allen, in his Official Capacity as Chair of the North Carolina Industrial Commission; and Yolanda K. Stith, in her Official Capacity as Vice-Chair of the North Carolina Industrial Commission	Plt's PDR Prior to a Determination by COA	Allowed
316P98-4	State v. Billy Ray Artis	Def's *Pro Se* Motion for Petition for Rehearing	Dismissed **Ervin, J., recused**
323P18	State v. Ricky Charles Howell	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/27/2018**
331P01-5	State v. Nicholas Nathaniel Cauley	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-432)	Dismissed
332P17-2	Joris Haarhuis, Administrator of the Estate of Julie Haarhuis (deceased) v. Emily Cheek	1. Def's Motion for Temporary Stay (COA17-1179) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Reconsider and Vacate Order Allowing Temporary Stay	1. Allowed **10/19/2018** 2. 3. 4. Denied **10/22/2018**
332P18	State v. Michael Stanley Mazur and Anne-Marie Mazur	1. Def's (Anne-Marie Mazur) Motion for Temporary Stay (COA17-736) 2. Def's (Anne-Marie Mazur) Petition for *Writ of Supersedeas*	1. Allowed **10/05/2018** 2.

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332P18	State v. Michael Stanley Mazur and Anne-Marie Mazur	1. Def's (Michael Stanley Mazur) Motion for Temporary Stay (COA17-736) 2. Def's (Michael Stanley Mazur) Petition for *Writ of Supersedeas*	1. Allowed **10/08/2018** 2.
335P18	In the Matter of J.B.	1. State's Motion for Temporary Stay (COA17-1373) 2. State's Petition for *Writ of Supersedeas* 3. Counsel's Motion to Withdraw as Counsel of Record 4. Juvenile's Motion to Appoint the Appellate Defender 5. Juvenile's Motion for Extension of Time to Respond to PDR	1. Allowed **10/08/2018** 2. 3. Allowed **10/11/2018** 4. Allowed **10/11/2018** 5. Allowed **10/11/2018**
340A95-6	State v. William E. Morganherring, IV	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion for DNA Testing of Biological Specimens	1. Denied **10/02/2018** 2. Dismissed **10/02/2018**
352P18	Elizabeth E. LeTendre v. Currituck County, North Carolina and Michael Long and Marie Long	1. Plt's Motion for Temporary Stay (COA18-163) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/18/2018** 2. 3.
355P18	State v. Shelly Anne Osborne	1. State's Petition for *Writ of Supersedeas* 2. Application for Temporary Stay	1. 2. Allowed **10/22/2018**
402PA15-3	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414-3) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **10/15/2018** 3.
449P11-21	In re Charles Everette Hinton	1. Plt's *Pro Se* Motion to Amend 2. Plt's *Pro Se* Motion for Trial by Jury and Separate Trials 3. Plt's *Pro Se* Motion for Relief from Court Orders	1. Denied **10/08/2018** 2. Denied **10/08/2018** 3. Denied **10/08/2018** **Ervin, J., recused**

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532P08-3	State v. Frank Durand Tomlin	1. Def's Motion for Temporary Stay (COA17-351)	1. Allowed **07/11/2018** Dissolved **10/24/2018**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Petition for *Writ of Certiorari* to Review Decision of COA	4. Denied
		5. State's Conditional PDR Under N.C.G.S. § 7A-31	5. Dismissed as moot

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